Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1997

RICHARD L. STEAGALL,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, and THE HONORABLE JOE B. MCDADE, a District Judge, thereof,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a proposed pretrial order submitted pursuant to Rule 16(c) and (d) Fed.R.Civ.P. for consideration at a final pretrial conference to be conducted under Rule 16(d) and (e) containing a proposed issue of law the district court had stricken constitute a "pleading, written motion, and other paper[ ]" subject to the sanction provisions of Rule 11(a) and (c), or is any sanction for such submission precluded by Rule 11(d) and permissible only as authorized by Rules 16(f) and 37(b) Fed.R.Civ.P., particularly where the issue "stricken" remained "subject to revision" under Rule 54(b)?

2. Assuming the applicability of the sanctioning authority of Rule 11(a) and (c) to submissions for consideration at the final pretrial conference to be conducted under Rule 16(d) and (e), may a court impose a monetary sanction pursuant to Rule 11(c)(1)(B) without addressing whether "existing law or a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law" warranted the submission when the refusal to so address punishes an attorney for (i) urging reconsideration of orders "subject to revision" under Rule 54(b) and (ii) pressing a claim established by this Court's and the Seventh Circuit's precedents as warranted by existing law, contrary to Rule 11(b)(2)?

3. May a district court enter the functional equivalent of a finding of criminal contempt under the guise of a Rule 11(c)(1)(B) sanction designed solely to punish without (i) affording the allegedly offending attorney the procedural safeguards necessary to the imposition of a

QUESTIONS PRESENTED – Continued

criminal penalty and (ii) recognizing an attorney's duty to attempt to effect revisions under Rule 54(b) of erroneous orders respecting "one or more but fewer than all the claims or parties" regarding which the district court had not directed the entry of judgment?

PARTIES IN THE COURT BELOW

Petitioner, Richard L. Steagall, is the attorney for the plaintiff Gerard R. Serritella in the United States District Court for the Central District of Illinois, Peoria Division, in that certain action entitled, "Serritella v. Markum, et al.", no. 93-1353. The Respondents, United States District Court for the Central District of Illinois, Peoria Division, and the Honorable Joe Billy McDade, a United States District Judge, thereof, are the court and judge respectively whose monetary sanction order Petitioner appealed to the United States Court of Appeals for the Seventh Circuit. The Respondents were represented in the court below by counsel appointed by the Seventh Circuit. No parties to the underlying litigation were part of the proceedings in the court below and are not parties to this petition.

RULE 29.1 STATEMENT

Petitioner is an individual and the Respondents are an Article III court and judge thereof, respectively.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard Steagall (Petitioner), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a final and appealable order issued by the United States District Court for the Central District of Illinois, Peoria Division, (McDade, J.) imposing a monetary sanction in the amount of $1,500.00 pursuant to Rule 11(c)(1)(B) Fed.R.Civ.P.

I.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-19a), is reported at 119 F.3d 506 (7th Cir. 1997). The relevant opinions and orders of the district court (McDade, J.) (App. D, *infra*, 24a-58a), are not reported.

II.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 20a-21a) was entered July 9, 1997. Petitioner filed a timely petition for rehearing resulting in an order amending the opinion but otherwise denying the petition, entered July 29, 1997, (App. C, *infra*, 22a-23a). This petition for certiorari is being brought within 90 days of the order of the court of appeals amending in part its opinion of July 9, 1997 and otherwise denying rehearing on July 29, 1997. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

The United States Constitution, Amendment V in relevant part provides:

> "No person shall be . . . deprived of life, liberty or property without due process of law".

Rule 11(b), Fed.R.Civ.P. provides:

> "(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . .
>
> "(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. . . . "

Rule 11(c), Fed.R.Civ.P. provides:

> "(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
>
> "(1) How Initiated . . .
>
> "(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an

attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

Rule 11(d), Fed.R.Civ.P. provides:

"(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37."

Rule 16(c), "Subjects for Consideration at Pretrial Conferences" provides in relevant part:

"At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to

"(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

"(2) the necessity or desirability of amendments to the pleadings . . .

"(4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence . . . "

Rule 16(d), "Final Pretrial Conference" provides:

"Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties."

Rule 16(e), "Pretrial Orders" provides:

"After any conference held pursuant to this rule, an order shall be entered reciting the action

taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice."

Rule 16(f), "Sanctions" provides:

"If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust."

Rule 37(b)(2)(B), (C), and (D) provides:

"(b) Failure to Comply With Order.

"(2) Sanctions by Court in Which Action is Pending. If a party or officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the

failure as are just, and among others the following:

> "(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
>
> "(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> "(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination."

Rule 54(b), "Judgment Upon Multiple Claims or Involving Multiple Parties", provides:

> "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reasons for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decisions, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at

> any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

Rule 16.1(E), Rules, Central District of Illinois, "Final Pretrial Conference" provides:

> "(4) Prior to the date set for the final pretrial conference, the parties shall confer and shall prepare a proposed final pretrial order for presentation to the court at the conference, unless otherwise ordered by the court . . . "

IV.

STATEMENT OF THE CASE

Petitioner, in his representative capacity, filed a complaint for one Gerard A. Serritella, also an attorney, as plaintiff against various Illinois State Police officials in the United States District Court for the Central District of Illinois, on September 14, 1993, invoking the district court's jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1367. Plaintiff, through Petitioner, sued under 42 U.S.C. § 1983, alleging *inter alia* violations of his Fourth and Fourteenth Amendment rights to be free from arrest without probable cause where the probable cause was created by fraudulently fabricated evidence. Apps. A, 1a-4a and D, 24a-58a. Plaintiff, through Petitioner, alleged he had been arrested and prosecuted for driving under the influence of alcohol by means of the fabrication of inculpatory and destruction of exculpatory evidence by Illinois State Police officials Markum and Karsted, motivated by plaintiff's having successfully secured back pay for an Illinois State police officer whom the Illinois courts found had been unlawfully discharged by the Illinois State Police.[1]

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[1] *Fernandez v. Margolis*, 201 Ill.App. 3d 47, 558 N.E. 2nd 736 (3d Dist. 1990).

On April 28, 1994, the district court entered an order striking plaintiff's claim against Officer Markum alleging the fabrication of evidence to create probable cause, saying, "fabrication of evidence is not a Fourth Amendment concern and is not, therefore, a properly pled claim under § 1983." App. D, 25a-26a. The court further observed that to the extent plaintiff, through Petitioner, was attempting to plead a malicious prosecution under § 1983, *Albright v. Oliver*, 510 U.S. 266 (1994), foreclosed such a cause of action, but allowed plaintiff, through Petitioner, to proceed against the officers on a common law malicious prosecution claim under the court's supplemental jurisdiction, 28 U.S.C. § 1367. App. D, 27a-28a.

On May 12, 1994, plaintiff, through Petitioner, moved the district court to reconsider or amend its April 28, 1994 order as being contrary to controlling precedents of this Court[2] and controlling Seventh Circuit precedents.[3] The district court on May 23, 1994, App. D, 29a, denied plaintiff's motion filed through Petitioner as "moot" for reasons the Seventh Circuit did not appear to understand. App. A, 3a.

After the completion of more discovery, various of the defendants moved for partial summary judgment as to some of the claims and some of the parties. App. D, 30a-35a. On April 19, 1995, the district court granted summary judgment as to defendant Karsted, who had been named as a party defendant on the theory he had supervised and directed Markum to fabricate inculpatory and destroy exculpatory evidence on the grounds that,

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[2] *E.g., Mooney v. Holohan*, 294 U.S. 103 (1935); *Franks v. Delaware*, 438 U.S. 152 (1978); *Malley v. Briggs*, 475 U.S. 335 (1986); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *United States v. Calandra*, 414 U.S. 338 (1974).

[3] *E.g., Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988); *Olsen v. Tyler*, 825 F.2d 1116 (7th Cir. 1984); *Reed v. City of Chicago*, 77 F.3d 1049 (7th Cir. 1996); and, *Smart v. Board of Trustees, University of Illinois*, 54 F.3d 432 (7th Cir. 1994).

> "fabrication of evidence . . . is not a Fourth Amendment concern and, consequently, was not a properly pled Fourth Amendment claim under 42 U.S.C. § 1983".

App. D, 30a-35a. The district court relied on Judge Easterbrook's language in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), on remand from *Buckley v. Fitzsimmons, supra*, 509 U.S. 259, 281 (Scalia, J., concurring) that there is

> " 'no authority for the proposition that the mere preparation of false evidence as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms them, violates the Constitution.' "

App. D, 33a. The district court also precluded plaintiff, through Petitioner, proceeding against defendant Karsted as Markum's supervisor for having directed Markum to fabricate inculpatory and suppress exculpatory evidence to create fraudulent probable cause as Petitioner had not been diligent in pursuing that theory against Karsted. App. D, 33a-35a.[4] Plaintiff, through Petitioner, then moved for leave to file an amendment to his second amended complaint strictly against Karsted on a supervisory responsibility theory, which the district court, on January 8, 1996, denied. App. D, 33a-35a, 39a-40a.

The district court scheduled a final pretrial conference for May 24, 1996. App. D, 41a-42a. Prior thereto, the parties, on February 13, 1996, participated in a "preliminary" final pretrial conference conducted by the magistrate-judge, in the wake of which the district court ordered plaintiff to "file a revised pretrial order deleting any claims as to Officer Karsted, consistent with the [district court's] previous order", presumably meaning its orders of April 28, 1994, April 19, 1995 and January 8, 1996. App. D, 41a.

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[4] Eventually, the court sanctioned Petitioner by censure for including the fabrication of evidence claim in violation of the April 28, 1994 order striking such claim. App. D, 36a-38a.

On May 22, 1996, plaintiff, through Petitioner, submitted a proposed final pretrial order anticipatory of the final pretrial conference to be conducted May 24, 1996, pursuant to Rule 16(d) Fed.R.Civ.P., which form of order complied in all respects with Rule 16.1, *supra*. App. D, 41a. Plaintiff's proposed pretrial order submitted by Petitioner prior to the pretrial conference included, under the heading, "Contested Issues of Law", the following language appearing at App. D, 50a-51a, the entire "offending" submission recited by the district court at App. D, 48a-54a:

> "1. If the court's April 28, 1994 and April 19, 1995 orders ruling that police fabrication of evidence does not violate the Fourth Amendment are the law of this case, then is there any issue to be tried?
>
> "(A) This court has issued the following rulings:
>
> "(1) On April 28, 1994, the court ruled that a policeman who fabricates evidence of probable cause for arrest does not deprive the person arrested of his Fourth Amendment rights.
>
> "(2) In its April 19, 1995 order, [the court] ordered plaintiff's counsel to show cause why he should not be sanctioned for alleging that Trooper Markum and others joined as additional defendants in the amended complaint deprived plaintiff of his Fourth Amendment rights by fabricating evidence of his grounds for probable cause, ultimately censoring plaintiff's counsel for that allegation.
>
> "(B) Plaintiff contends that Trooper Markum's grounds for probable cause to arrest plaintiff were a total fabrication.
>
> "(C) Under this court's rulings – which are the law of the case – there is no issue to be

> tried. This court has ruled that the conduct plaintiff intends to prove is not a deprivation of Fourth Amendment."

On May 24, 1996, the date scheduled for the pretrial conference, the parties and their counsel appeared for what they anticipated would be a pretrial conference. App. D, 41a-42a. The district court, however, *sua sponte* cancelled the final pretrial conference and instead scheduled an evidentiary hearing for July 12, 1996 against Petitioner,

> "on possible criminal contempt . . . for violating this court's February 27, 1996 order in that [Petitioner] failed to delete claims as to Officer Karsted and by failing to restrict alleged disputes and issues of fact to the various factual elements of the claims to be tried before the jury."

App. D, 41a-42a. In addition, the district court, on May 24, 1996, said that it

> "believ[ed] [Petitioner] ha[d] violated Rule 11 by filing a pretrial order that has been presented for the improper purpose of harassing or causing unnecessary delay or needless increase in the cost of litigation by raising claims which have been disposed of in prior orders of this court and given notice that he should respond in notice by June 7, 1996, to the oral notice of Rule 11 in regard to the proposed pretrial order."

App. D, 41a-42a. The district court continued the pretrial conference to August 2, 1996. App. D, 42a.

On June 5, 1996, plaintiff, through Petitioner, moved to withdraw the proposed pretrial order and, on June 6, 1996, filed a response to the district court's order to show cause directed to the court's notice that he do so issued pursuant to Rule 11(c)(1)(B). App. D, 42a. Without ruling on Petitioner's motion to withdraw, the district court on June 11, 1996, ordered a monetary sanction in the sum of

$1,500.00, assessed against Petitioner, App. D, 42a, 44a-57a, which sum Petitioner paid on July 2, 1996. App. D, 43a. On July 2, 1996, Petitioner moved to dismiss the criminal contempt citation arguing that it constituted a double jeopardy. App. D, 58a, which motion the district court on July 29, 1996 denied.

Petitioner filed his Notice of Appeal on July 8, 1996, from the district court's order of June 11, 1996, imposing a monetary sanction against him. App. D, 58a. As the Notice of Appeal related to an order collateral to the pending litigation in the district court and to a person not a party to that litigation, the district court litigation continued in the district court and, on August 2, 1996, the district court granted Petitioner's June 5, 1996 motion to withdraw the proposed pretrial order he had submitted on May 22, 1996. App. D, 58a. On April 25, 1997, the district court dismissed the citation directing Petitioner to show cause why he should not be held in criminal contempt. App. D, 58a.

The court of appeals affirmed in all relevant respects. App. A, 1a-19a. In so doing, the court of appeals did not address Petitioner's argument, submitted both in that court and the district court, that his proposed pretrial order based upon previous pleadings which the district court had stricken, constituted a correct statement of the law or a "nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law", and that the various orders which Petitioner continued to press were at all times "subject to revision". App. A, 1a-19a.

V.

REASONS FOR GRANTING THE WRIT

A.

The Court of Appeals Has Approved an Extraordinary Departure, Contrary to This Court's Precedents, From the Particularized Sanctioning Authority Specified in Rule 16(f) to Enforce Compliance With Pretrial Management Procedure Prescribed in Rule 16(b) Through (e) and From the Prohibitions of Rule 11(d) by Upholding a Monetary Sanction Pursuant to Rule 11(c)(1)(B), Thus Creating Conflict Between the Sources of Sanctioning Authority Provided by the Federal Rules to Address Discrete Categories of Violations, Thereby Requiring This Court's Review to Prevent Use of Rule 11(c)(1)(B) as a Source of Undefined and Unlimited Power to Punish

1.

The 1993 Amendments to Rule 11 as Reflected in the Advisory Committee Notes Demonstrate an Intent to Lessen the Potential for Abuse of a District Court's Sanctioning Authority

Pursuant to the Rules Enabling Act, 28 U.S.C. § 2072, this Court submitted the 1993 amendments to Rule 11 Fed.R.Civ.P. to Congress which took no action, thereby allowing the amendments to become effective December 1, 1993. Amended Rule 11 altered Rule 11 practice developed by the 1983 amendments. Rule 11 1993 Amendment Advisory Committee Notes, 12A, Wright-Miller, Kane & Marcus, **Federal Practice and Procedure,** pp. 196-208 (1997) (hereafter, WMKM, Ad. Com.). Important among the amendments are requirements that the Rule 11 motion be filed separately; that the parties against whom the motion is brought receive notice and have an opportunity to be heard; that the court explain any decision

imposing a sanction; and, the party against whom sanctions are sought be afforded a 21 day "safe harbor" to withdraw the offending pleading. WMKM, Ad. Com., *supra*, pp. 206-207. The "safe harbor" provision was designed, in part, to lessen Rule 11 activity. *Id.*, p. 207. The power of the court to act on its own initiative was retained in amended rule 11(c)(1)(B) on the condition that it be done through an order to show cause permitting the offending party or attorney to respond. *Id.* Additionally, the amendment provides that a monetary sanction imposed pursuant to the court's own initiative pursuant to 11(c)(1)(B) is limited to a penalty payable to the court and only under circumstances where the notice to show cause was issued prior to any voluntary dismissal of the offending document. *Id.*

The Advisory Committee Notes further provide that,

> "Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for these purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the cost of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney client privilege or the work product doctrine."

Id., p. 206. Amended Rule 11 retains the exemption from sanctionability for pleadings containing

> "arguments for extensions, modifications, or reversals of existing law or for the creation of new law . . . provided they are 'nonfrivolous' ".

WMKM, Ad.Com., p. 203. The Advisory Committee noted the exemption from sanctionability under 11(b)(2) is to be judged by an objective standard, "intended to eliminate any 'empty head, pure heart' justification for patently frivolous arguments." *Id.* But, the Advisory Committee emphasized that,

> "the extent to which a litigant has researched the issues and found some support for its theories, even in minority opinions, in law review articles, or through consultation with other attorneys, should certainly be taken into account in determining whether [Rule 11(b)(2)] has been violated."

Id. The Advisory Committee further specified that while

> "arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule."

Id.

2.

The 1993 Amendments to Rule 11 Demonstrate an Attempt to Make the Source of a Court's Authority to Sanction More Particularized to a Perceived Violation

Amended Rule 11 also included an altogether new provision in subdivision (d), establishing that, "certification standards and sanctions that appl[ied] to discovery disclosures, requests, responses, objections, and motions" were to be governed by Rule 26(g) and Rule 37(b). As such, Rule 11(d) necessarily incorporates, at least by implication, Rule 16(f) prescribing as the source of a district court's authority to sanction a party for violating provisions relative to pretrial management prescribed by Rule 16 and enforceable by Rule 16(f). That proposition follows from Rule 16(f)'s incorporation of the sanctioning alternatives provided by Rule 37(b), just as does Rule 11(d). Thus, Rule 16(f)'s provision for a district court's

sanctioning authority for submissions violative of Rule 16 pretrial management prescriptions accomplishes by incorporating the sanction alternatives of Rule 37(b) precisely what Rule 11(d) seems to intend by precluding Rule 11(c) as a source of sanctioning authority for discovery related pleadings in favor of Rule 37(b).

Presumably, the Advisory Committee Notes admonishing parties to refrain from using Rule 11 for the improper purposes discussed, *supra*, or from using it for marginal or inconsequential violations, apply equally to the district court's authority to initiate Rule 11 sanctions under Rule 11(c)(1)(B). The problem created in this case and not addressed by the lower courts is not the range but the source of the district court's discretion. The courts below sanctioned and upheld the sanction respectively of Petitioner under Rule 11(c)(1)(B) for proffering a proposed pretrial order under pretrial management procedure governed by Rule 16. As such, the courts below sanctioned Petitioner for a submission seemingly sanctionable only through the authority specifically conferred by Rules 16(f) and 37(b).

Therefore, not only did the courts below authorize a sanction based on authority at variance with the language of Rules 11(d), 16(f), and 37(b), they did so at variance with this Court's precedents in *Cooter Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), and *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). Both *Cooter Gell* and *Chambers* implied, if they did not hold, that sanctions should be imposed pursuant to the source of authority for their imposition most directly addressing the nature of the alleged sanctionable conduct.

In *Cooter Gell*, this Court held that Rule 41(a)(1)(i) procedure authorizing dismissal without prejudice of a complaint did not prevent the power of a district court to impose a Rule 11 sanction after a party had invoked Rule 41(a)(1)(i) and voluntarily dismissed an action. This Court so held because Rule 41(a)(1)(i) did not contain any language of limitation which intimated that invocation of

its procedure diminished the power of a district court to impose sanctions for violations of Rule 11 as it existed under the 1983 amendments, nor did Rule 11 contain any such language of limitation itself.

Likewise, the petitioner in *Chambers, supra,* asserted that a court could not rely upon its "inherent" power to assess a party attorney's fees and costs as 28 U.S.C. § 1927 and the "various sanctioning provisions in the Federal Rules of Civil Procedure[5] reflect[ed] the legislative intent to displace the inherent power" of the court to punish. *Chambers, supra,* 501 U.S. at 42-43. This Court in *Chambers* disagreed and held that the court's inherent power was not limited by 28 U.S.C. § 1927 or the other sources of sanctioning power provided by the Federal Rules. *Chambers, supra,* 501 U.S. at 46. The Court in *Chambers* observed that nothing in 28 U.S.C. § 1927 or the other sources of sanctioning authority addressed the pre and post litigation fraudulent conduct by both the litigant and his attorney, which was redressable, if at all, only through the

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[5] 28 U.S.C. § 1927 provides under the heading "Counsel's Liability for Excessive Costs" as follows:

> "Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of this conduct."

Additionally, various of the Rules of Civil Procedure promulgated by this Court pursuant to its authority under 29 U.S.C. § 2072 provide a district court with sanctioning power under such as, Rule 11, Rule 16(f) pretrial conferences, Rule 26(g) certification requirement for discovery requests, Rule 30(g) oral depositions, Rule 37(b) sanctions for failure to cooperate with discovery, Rule 56(c) affidavits accompanying summary judgment motions.

court's inherent powers. See *Chambers, supra,* 501 U.S. at 48-50.

But, this Court in *Chambers* did say that,

> "*When there is bad faith conduct in the course of litigation that could be adequately sanctioned under the rules,* the court ordinarily should rely on the rules rather than the inherent power."

Chambers, supra, 501 U.S. at 50 (emphasis supplied). This Court added that if the district court, in its discretion, found that

> "neither the statute nor the rules [were] up to the task [of imposing an appropriate sanction to meet the circumstances], the court may safely rely on its inherent power."

Id.

3.

The Only Authority the District Court Possessed to Sanction Petitioner in This Case Derived From Rules 16(f) and 37(b), Not 11(c)(1)(B)

The position urged by Petitioner in this case is consistent with the holdings and rationale of *Cooter Gell* and *Chambers, supra.* Rule 11(d), when viewed in combination with Rule 16(f), requires that a paper submitted in violation of pretrial management procedure governed by Rule 16 be sanctioned in accordance with the sanctioning authority of Rule 16, namely, Rules 16(f) and 37(b). Rule 16(f) provides:

> "If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, *or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith,* the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and

> among others, any of the orders provided in Rule 37(b)(2)(B),(C) and (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust."

(Emphasis supplied). The Advisory Committee Notes to Rule 16(f) observe that,

> "[r]ule 16(f), [by] incorporat[ing] portions of Rule 37(b)(2), . . . should facilitate application of Rule 16(f), since courts and lawyers already are familiar with Rule 37 standards."

WMKM, Ad. Com., *supra*, at 250. Moreover, the Advisory Committee Notes to Rule 16(f) make clear that, "the imposition of sanctions may be sought by either the court or a party." *Id.* And, the Advisory Committee observes that,

> "The court has discretion to impose whichever sanction it feels is appropriate under the circumstances . . . [and] is reviewable under the abuse of discretion standard",

Id., citing *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

Petitioner was sanctioned for submitting a pretrial order anticipatory of a final pretrial conference. That submission made reference to previous orders of the district court striking plaintiff's claims through Petitioner that the defendants had violated plaintiff's Fourth Amendment rights by the creation of probable cause through the fabrication of inculpatory and destruction of exculpatory evidence. Plaintiff, through Petitioner stressed that such claim was central to his cause of action against the police officer defendants. The language for which Petitioner was sanctioned, quoted in full, *supra*, pp. 9-10, was, if anything, in

the form of a plea asking the court at the final pretrial conference, at which it would have the specific authority under Rule 16(c) and (d) to "eliminat[e] frivolous claims or defenses", and, pursuant to Rule 16(e), to direct the composition of the form and substance of the final pretrial order, to reconsider its previous orders striking plaintiff's Fourth Amendment claim.

Under Rule 54(b), the district court had not directed the entry of judgment as to any of its orders striking plaintiff's Fourth Amendment claims. As such, the district court had

> "adjudicat[ed] fewer than all the claims or the rights and liabilities of fewer than all the parties [and did not] terminate the action as to any of the claims or parties [thereby leaving the district court's orders] *subject to revision at any time before the entry of judgment. . . .* "

(Emphasis supplied).

Moreover, the provisions respecting the final pretrial order under Rule 16(e) and 16.1E of the Rules of the Central District of Illinois specify that it is to be entered after, not before, the final pretrial conference is conducted pursuant to Rule 16(d). Thus, the final pretrial order should be the product of the final pretrial conference, not something prepared to govern the conduct of the final pretrial conference.

Therefore, to the extent the district court believed Petitioner had engaged in sanctionable conduct, it had at its disposal the power conferred under Rule 16(d),(e) and (f), to strike the offending provisions and enter an order compensating any opposing party to the extent compensation was warranted. But, both lower courts exceeded the language and structure of Rules 11 and 16 and the mandate of this Court's precedents in *Cooter Gell, supra,* and *Chambers, supra.* Equally importantly, they disregarded the 1993 amendments to Rule 11 designed to make more definite the sources of a court's sanctioning authority by bringing Rule 11 standards into harmony

with the other sources of sanctioning authority. See WMKM, Ad.Com., *supra*, pp. 201; Stempel, *Sanctions, Symmetry and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It With Preverdict Dismissal Devices*, 60 Fordham L.Rev., 257, 280-281 (1991); Tobias, *The 1993 Revision of Rule 11*, 70 Ind. L.J., 171, 208-214 (1994).

The procedure employed and upheld by the courts below radically departs from the language, context and Advisory Committee instructions respecting Rules 11, 16, 37(b) and 54(b) and this Court's precedents in *Cooter Gell* and *Chambers, supra*. Such a radical departure from the procedures governing the means by which lower federal courts are to adjudicate substantive claims of citizens under the Constitution and laws of the United States requires this Court's review.

B.

Assuming the Applicability of Rule 11(c) as Opposed to Rule 16(f) as the Source of Authority to Sanction a Submission for Consideration at a Rule 16(d) and (e) Pretrial Conference, the Court Below Has Approved a Departure from the Enhanced Protections Provided by the 1993 Amendments to Rule 11(b)(2) as Reflected in the Advisory Committee Notes by Upholding a Monetary Sanction Without Addressing Whether the Proposed Submission Was "Warranted by Existing Law or by a Nonfrivolous Argument for the Extension, Modification, or Reversal of Existing Law or the Establishment of New Law", Thereby Requiring This Court's Review to Prevent the Use of Rule 11(c)(1)(B) to Circumvent the Heightened Protections Provided by Rule 11(b)(2)

1.

The Courts Below Disregarded the Requirement of Rule 11(b)(2) in Not Addressing Whether Petitioner's Submission Was "Warranted by Existing Law, or by a Nonfrivolous Argument for the Extension, Modification or Reversal of Existing Law or the Establishment of New Law"

The Advisory Committee Notes to the 1993 amendments and the academic commentary imply that in

determining the threshold at which an allegedly offending submission fails to satisfy the exception to sanctionable submissions articulated in Rule 11(b)(2) should cause a court to err, if at all, in the direction of finding an exemption from sanctionable conduct. The Advisory Committee was explicit: it said that Rule 11(b)(2) "establish[ed] an objective standard . . . for patently frivolous arguments". Ad. Com., *supra*, at 203. The Committee continued, and said that,

> "The extent to which a litigant has researched the issues and found *some* support for its theories even in minority opinions, the law review articles, or through consultation through other attorneys, should certainly be taken into account in determining whether [11(b)(2)] has been violated."

Id. (Emphasis supplied). The Committee then emphasized that even though arguments "for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under [11(b)(2)]". *Id.* See also, Tobias, *supra*, 27-28; 197-200.

The district court's April 28, 1994 order striking the fabrication of evidence to create probable cause as a Fourth Amendment claim against Markum, engaged in only a cursory analysis. App. D, 26a-28a. It discussed the Seventh Circuit's decision in *Albright v. Oliver*, 975 F.2d 343, 347 (7th Cir. 1992), holding that in absence of a claim of "incarceration or other palpable consequences", no § 1983 malicious prosecution action existed, a judgment, affirmed by this Court in *Albright v. Oliver, supra*, 510 U.S. 266, on the grounds that any claim for malicious prosecution as a constitutional tort under § 1983 must be pleaded under the Fourth Amendment.

The courts below did not discuss, let alone attempt to demonstrate, the inapplicability of any of the authorities which plaintiff, through Petitioner, cited in his motions for reconsideration. The district court denied the first

motion for reconsideration as moot and denied the motion directed to the April 19, 1995 ruling out of hand. App. D, 29a, 39a-40a. The Seventh Circuit affirmed by serializing the chronology of plaintiff, through Petitioner, twice pleading the "fabrication of false evidence to create probable cause as a Fourth Amendment violation" theory; the district court's having twice stricken said claim; plaintiff's, through Petitioner, including that claim in a preliminary proposed pretrial order; the district court's directing him to delete said claim from the proposed final pretrial order; followed by plaintiff, through Petitioner, including that claim in the proposed final pretrial order.

Moreover, both the lower courts overlooked Petitioner's right, if not duty for his plaintiff client under Rule 54(b), to continue to attempt to persuade the district court that its striking his fabrication of inculpatory and destruction of exculpatory evidence to create probable cause as a Fourth Amendment violation was error. Under Rule 54(b), quoted *supra*, the orders striking the Fourth Amendment claim remained "subject to revision."

2.

The Result Below Is a Bizarre Departure From Rule 11 Practice As This Court's, and the Seventh Circuit's Precedents, and a Contemporaneous Precedent of a Different Judge of the Same Division of the Sanctioning District Court Demonstrate that Petitioner's Proposed Pretrial Order Was "Warranted by Existing Law"

As noted, the Advisory Committee Notes Relative to the amendments to Rule 11, and in particular Rule 11(b)(2), made clear that if an attorney has shown at least some objectively reasonable authority for his submission, the courts should view it with "tolerat[ion]". WMKM, Ad.Com, p. 203. This Court's precedents and the controlling precedents of the Seventh Circuit demonstrate that plaintiff's Fourth Amendment claim through Petitioner was warranted by existing law.

In *Mooney v. Holohan, supra,* 294 U.S. at 112, the Court held that a conviction based upon knowingly false testimony was "as inconsistent with the rudimentary demands of justice as the obtaining of a like result by intimidation." In *Webb v. Texas,* 409 U.S. 95 (1972), this Court held that intimidation preventing a defense witness from testifying violated a criminal defendant's rights to compulsory process and due process of law. *Mooney v. Holohan, supra,* was extended to the unknowing use of perjured testimony in *Napue v. Illinois,* 360 U.S. 264 (1959). *Mooney, supra; Webb, supra;* and, *Napue, supra,* were all decided on a due process basis.

Then, in *United States v. Calandra, supra,* 414 U.S. at 343, 354-355 n.10, this Court intimated, if it did not hold, that the Fourth Amendment provided a source of relief for individuals aggrieved by the acts of state or federal officers who fabricated evidence for presentation to a grand jury resulting in a fraudulent indictment. *Calandra, supra,* was made more specific in *Buckley v. Fitzsimmons, supra,* where this Court held that a prosecutor, generally entitled to absolute immunity for acts in connection with his judicial function, see *Imbler v. Pachtman,* 424 U.S. 409 (1986), was entitled only to qualified immunity for fabricating evidence he knew to be false for submission to and use by a grand jury in securing an indictment.

In *Brinegar v. United States,* 338 U.S. 160, 176 (1949), this Court held that the Fourth Amendment probable cause standard "safeguards citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime." Subsequently, in *Franks v. Delaware, supra,* 438 U.S. at 164-165, this Court, adopting the rationale of *United States v. Helsey,* 257 F.Supp. 1002, 1005 (S.D. N.Y. 1966), held that the Fourth Amendment forbids knowing falsity in affidavits filed in support of search or arrest warrants.

Moreover, in *Malley v. Briggs, supra,* the Court held police officers only qualifiedly immune for the lesser transgression of presenting to a magistrate, not fabricated

evidence, but truthful evidence an objectively reasonable officer would have known did not create probable cause justifying the issuance of an arrest warrant. The Court in *Malley* further held that a magistrate's erroneous issuance of an arrest warrant did not insulate the police officer from a § 1983 action.

Pending before this Court for decision after argument on October 7, 1997 is Kalina v. Fletcher, No. 96-792, on the question whether a prosecutor who knowingly submits false evidence to a magistrate for the purpose of securing an arrest warrant is entitled to absolute or qualified immunity from an action for damages under 42 U.S.C. § 1983 for violation of the arrestee's Fourth Amendment rights. The mere fact that this Court granted certiorari on that issue demonstrates the objectively reasonable nature of plaintiff's Fourth Amendment claim through Petitioner against the defendant police officers.

Therefore, the inference is compelling that this Court's precedents combining the due process principles of *Mooney v. Holohan, supra; Webb, supra; Napue v. Illinois, supra,* with the Fourth Amendment principles of *Calandra, supra; Brinegar, supra; Franks v. Delaware, supra,* and, *Buckley v. Fitzsimmons, supra,* warrant a Fourth Amendment seizure claim based upon the fabrication of evidence by law enforcement officials for the purpose of creating false probable cause. The question this Court left open in *Albright, supra,* is the extent to which such a violation of the Fourth Amendment proximately resulting in a baseless prosecution supports a malicious prosecution claim as a constitutional tort.

The Seventh Circuit has similarly held. In *Olsen v. Tyler, supra,* the court held that the presentation of false evidence in an affidavit to a prosecutor either in a seizure or a prosecution, violated clearly established Fourth Amendment and stated a § 1983 cause of action. The Seventh Circuit said,

> "If an officer submitted an affidavit that contained statements he knew to be false or would

> have known were false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements, not only is his conduct a cause of the illegal arrest, but he cannot be said to have acted in an objectively reasonable manner."

Olsen v. Tyler, supra, 771 F.2d at 281. *Olsen, supra,* was a pre-*Albright* case and referred only to an illegal arrest. Then, in *Reed v. City of Chicago, supra,* the Seventh Circuit specifically anticipated that this Court might find malicious prosecution as a constitutional tort in violation of the Fourth Amendment if the traditional common law elements of malicious prosecution were stated in addition to

> "allegations that the [officers] falsified . . . information or evidence [or] discovered exculpatory material and withheld it . . . [or] committed any improper acts after [the] arrest."

Reed, supra, 77 F.3d at 1053.

Ironically, within the same time frame the district court was holding and sanctioning first by censure and then by monetary penalty, a different judge of the same division of the same district was deciding the same issue in diametric opposition. On March 7, 1996, Judge Mihm of the Central District, Peoria Division, approved a Report and Recommendation by the magistrate upholding a complaint alleging under *Bivens [v. Six Unknown Named Federal Narcotics Agents,* 403 U.S. 388 (1971)], a malicious prosecution claim based on the fabrication of evidence presented to a grand jury resulting in plaintiff's indictment as violating both the Fourth Amendment probable cause standard and the Fifth Amendment grand jury clause. See, App. E, 59a-68a, hereto.[6]

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[6] Hammond v. Kunard, No. 94-1331, in the United States District Court for the Central District of Illinois, Peoria Division,

Those disparate results coming at the same time from the same division of the same district demonstrate the arbitrary, capricious, and, indeed, whimsical nature of the results below. The conflicting conceptions of the applicable law within the same division of the same district are problem enough. The imposition of sanctions by one of the two judges of the same division of the same district against an attorney for pressing a claim still "subject to revision" under Rule 54(b), and found by another judge of the same division of the same district to state a claim is a bizarre and unacceptable result. It requires this Court's review.

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is presently before the Court of Appeals for the Seventh Circuit as case no. 96-2343, on the government's interlocutory appeal from the denial of qualified immunity in plaintiff's *Bivens* action. The court of appeals originally questioned whether it had jurisdiction as it appeared on the basis of the short record that questions of fact may have been implicated in the district court's denial of qualified immunity under *Johnson v. Jones*, 115 S.Ct. 2151 (1965) and *Behrens v. Pelletier*, 116 S.Ct. 834 (1996).

The court of appeals, however, on September 17, 1997, set a briefing schedule pursuant to the Plaintiff-Appellee's motion that it do so, limited to the strictly legal question as to whether the fabrication of evidence upon which a federal grand jury indicts and pursuant to which indictment a criminal defendant suffers severe restrictions on his freedom as conditions of bond, including weekly submissions to urine tests, refraining from seeing various individuals, including his own son, refraining from the use of alcohol or drugs, weekly reports to the U.S. Probation Office 60 miles distant from his home, constitutes a malicious prosecution cognizable under the Fourth Amendment probable cause standard and the Fifth Amendment grand jury clause. Either way the Seventh Circuit rules on that issue, the question would seemingly then be postured to enable this Court to examine the extent to which a § 1983 or *Bivens* malicious prosecution claim can be stated so as to resolve the issue left open by this Court in *Albright, supra.*

C.

The Court Below Has Approved an Extraordinary Expansion of the Sanctioning Authority of Rule 11(c)(1)(B), Allowing Its Use as a Surrogate for Criminal Contempt Without (i) Affording the Safeguards Secured by Due Process Necessary to the Imposition of Any Criminal Penalty and (ii) Recognizing an Attorney's Duty Under Rule 54(b) to Attempt to Secure Revisions of Erroneous Orders as to "One or More But Fewer Than All the Claims or Parties" With Respect to Which the District Court Has Not Directed the Entry of Final Judgment

The Advisory Committee Notes to the 1993 amendments make clear that, "The purpose of Rule 11 sanctions is to deter rather than to compensate. . . . " WMKM, Ad.Com., *supra*, 204. Accordingly, "a monetary sanction . . . should ordinarily be paid into court as a penalty." *Id.* Moreover, the Advisory Committee has made clear that while "the power of the court to act on its own initiative is retained" in amended Rule 11, it must be accomplished "through a show cause order." *Id.*, at 207. As such, the Advisory Committee has made clear that "show cause orders" issued by the court "will ordinarily be issued only in situations that are akin to a contempt of court. . . . " *Id.*, at 208. Indeed, the district court in this case simultaneously with its issuance of the notice to show cause to Petitioner why he had not been guilty of sanctionable conduct under Rule 11(c)(1)(B) submitted a separate citation to show cause why he should not be held in criminal contempt.

The proceeding initiated by the district court pursuant to Rule 11(c)(1)(B) was, by the district court's acknowledgment, App. D, 36a-38a, 58a, " 'to vindicate the authority of the [district] court.' " *Hicks v. Feiock*, 485 U.S. 624, 631 (1988), quoting *Gompers v. Buck Stove and Range Company*, 221 U.S. 418, 441 (1911). See also *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1329 (2nd Cir. 1995).

The monetary sanction was imposed against Petitioner after he had been given a notice to show cause, but without the court affording any hearing or indicating the standard of proof by which it found him guilty of sanctionable conduct. App. D, 36a-38a. Thus, Petitioner was denied his right to require the court to prove that his conduct was sanctionable beyond a reasonable doubt. *Hicks v. Feiock, supra,* 485 U.S. at 632; *Gompers, supra,* 221 U.S. at 444.

Clearly, the district court was angry that Petitioner persisted in asserting a claim the district court had stricken, notwithstanding that said claim was warranted by this Court's precedents, the Seventh Circuit's precedents, and the contemporaneous precedent of a different judge from the same division of the same district. But, a district court's anger and sensitivity should never be, and in this case should not have been, the basis for a sanction judgment. The court overlooked Rule 54(b) and the fact that it's orders striking the claims were not reduced to final judgment and were thereby "subject to revision". Petitioner had a right, if not a duty, to attempt to impress upon the district court before final judgment that it had erred. Petitioner discharged that duty. He afforded the district court opportunity after opportunity to correct its error. Unfortunately, the district court declined Petitioner's repeated invitations, submitted in the most respectful of fashions, to amend its clearly erroneous striking of a valid Fourth Amendment claim for relief.

The district court's departures from customary procedure upheld by the court of appeals in not considering the exemptions of Rule 11(b)(2), in disregarding the prohibitions of Rule (d), in failing to consider this Court's precedents in *Cooter Gell, supra,* and *Chambers, supra,* in overlooking the nature of orders still "subject to revision" under Rule 54(b), and in disregarding the discrete sanctioning authority provided by Rule 16(f) for the violation the district court thought Petitioner had committed, are

unacceptable and beyond the ordinary course of procedures for resolving cases prescribed by the Federal Rules of Civil Procedure. Moreover, the procedures followed and upheld below greatly expand the sanctioning authority of Rule 11(c)(1)(B). They weaken the purpose of the 1993 amendments. They authorize an extraordinary and radical use of Rule 11 as a plenary means, without safeguards, to subject individuals such as Petitioner to *de facto* criminal contempt without affording a modicum of the due process required.

This Court's review is necessary to correct and prevent the aberrant proceedings below from becoming widespread. Absent this Court's review, precedent will exist giving Rule 11 a greater potential for chilling legitimate advocacy than before the 1993 amendments which were designed to ameliorate Rule 11's potential for such chilling of legitimate advocacy.

CONCLUSION

For the reasons above stated, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the Seventh Circuit.

Respectfully submitted,

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(309) 833-1797

Attorney for Petitioner

APPENDIX A

Gerard A. SERRITELLA, Plaintiff,

v.

Paul MARKUM, an Illinois State Trooper, in his individual capacity, Kevin Eack, Counsel to Terry Gainer, Director of the Illinois State Police, in his individual capacity, Terry Gainer, Director of the Illinois State Police, in his individual capacity, et al., Defendants-Appellees.

Appeal of Richard L. STEAGALL, Appellant.

No. 96-2697.

United States Court of Appeals,
Seventh Circuit.

Argued June 6, 1997.

Decided July 9, 1997.

As Amended on Denial of Rehearing
July 29, 1997.

Thomas A. Keith, Office of the United States Attorney, Peoria, IL, for Defendants-Appellees.

Richard L. Steagall (argued), Nicoara & Steagall, Peoria, IL, for Appellant.

Mark T. Dunn, Dunn, Ulbrich, Hundman, Stanczak & Ogar, Bloomington, IL, pro se, Amicus Curiae.

Before CUMMINGS, RIPPLE and ROVNER, Circuit Judges.

CUMMINGS, Circuit Judge.

Plaintiff Gerard Serritella sued Illinois State Trooper Paul Markum and others under 42 U.S.C. § 1983 alleging

that his August 9, 1993, arrest for speeding and driving under the influence of alcohol violated the First and Fourth Amendments. To our knowledge, no final order has been issued with respect to his claims. Instead, this appeal is by Richard Steagall, attorney for Serritella, claiming that a May 17, 1995, order imposing a sanction of censure against him was unjust. Steagall also appeals from a June 11, 1996, order imposing a $1,500 sanction.

The censure was for Steagall's including in his second amended complaint an allegation that Markum fabricated the evidence of probable cause to arrest Serritella (and thereby violated Serritella's Fourth Amendment rights) despite an earlier order (dated April 28, 1994) by the district court striking an identical claim from the first amended complaint as not stating a cognizable claim. The April 28 order granted the plaintiff 14 days to file an amended complaint "in accordance with the legal principles discussed in this order."

Steagall responded to the April 28, 1994, order with a motion to alter or amend that order in which he advised the court of his view that the order's ruling that fabrication of evidence is not a Fourth Amendment concern is erroneous and inconsistent with Supreme Court and Seventh Circuit precedent. Contemporaneously, Steagall filed a motion for extension of time to file a memorandum in support of his motion to amend, again highlighting to the court that the April 28 order contained "serious errors." He also submitted a motion for oral argument on the motion to alter or amend, stating that he was confused (apparently by the court's orders), that the court's ruling was "contradicted by all existing Supreme Court authority," and that oral argument was necessary to ensure that

he fulfill his duty of bringing the applicable law to the court's attention. The district judge denied the motion for extension of time and subsequently indicated that that denial rendered the motion to alter or amend (and for oral argument) moot.[1]

In due course, Steagall filed a second amended complaint repleading verbatim the fabrication of evidence allegation stricken by the April 28 order, with respect to which the district court specifically directed plaintiff to replead "in accordance with the legal principles discussed in this order." Thereafter, the defendants in the underlying action moved for summary judgment, *inter alia*, on the Fourth Amendment claim, noting that the court had stricken the claim from the first amended complaint and that the law had not changed since the April 28 order. In response to the motion for summary judgment on this issue, Steagall submitted a brief in which he argued that "Defendants seek to perpetuate the error of

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[1] It is unclear from the record why the district judge deemed the motion to alter or amend moot. Judge McDade's minute order of May 23, 1994, simply states: "The minute entry dated 5/13/94 denying Pltf's. motion to extend time to file a memorandum in support of his motion to alter or amend . . . was intended to moot [the motion to alter or amend, the motion for leave to file a memorandum in support, and the motion for oral argument on the motion to alter or amend]." We note that the Central District of Illinois' Local Rule 7.1 requires every motion raising a question of law to be "accompanied by a memorandum of law including a brief statement of the specific points or propositions of law and supporting authorities on which the moving party relies, and identifying the rule under which the motion is filed." Thus perhaps Judge McDade regarded the motion to alter or amend as improperly filed under the Local Rule.

this court's ruling in its April 28, 1994 Order that police 'fabrication of evidence raises no Fourth Amendment concerns.' " Steagall then proceeded in the brief to argue the merits of the issue once again, citing the same Supreme Court and Seventh Circuit cases that he cited to the court in his motion to alter or amend the April 28 order. Judge McDade granted summary judgment in favor of the defendants on the claim[2] and ordered Steagall to show cause why his conduct did not violate Rule 11(b)(1), stating:

> [T]he Court finds that Plaintiff's refiling of an identical claim in the Second Amended Complaint subsequent to an Order filed by the Court striking the claim as not presenting a cognizable section 1983 claim is subject to Rule 11 sanctions under the Federal Rules of Civil Procedure. Plaintiff's insistence upon repleading a claim after rejection by the Court is the sort of conduct Rule 11 was meant to regulate. Under Rule 11(b)(1), the Court is disposed to find that

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[2] Defendants also sought and were granted summary judgment on Serritella's conspiracy claim, which asserted that Officer Markum conspired with various other defendants – including Captain Keith Karsted of the Illinois State Police; Stephen Johnson, an Illinois State Police Master Sergeant; Terry Gainer, Director of the Illinois State Police; and others – to violate Serritella's Constitutional rights in retaliation for his representation of a probationary State Police officer in a wrongful discharge action. Thus after entry of the April 19, 1995, Order granting partial summary judgment, all that remained in Serritella's case was his claim for arrest without probable cause against Officer Markum.

> Count B of Plaintiff's Second Amended [Complaint] was "presented for [the] improper purpose . . . [of] caus[ing] unnecessary delay or needless increase in the cost of litigation."

Order (April 19, 1995) at 5.

Steagall responded to the order to show cause with a memorandum arguing that inclusion of the dismissed claim was necessary to preserve for appeal the issue of whether police fabrication of evidence to support a probable cause determination violates the Fourth Amendment. Steagall took the opportunity, once again, to recite his interpretations of Supreme Court and Seventh Circuit decisions, which, he maintains, support his view that the district court erred in dismissing his fabrication of evidence claim. After outlining the decisions in his response to the order to show cause, Steagall commented:

> Plaintiff's counsel has twice attempted to obtain a specific ruling from this court on how its holding that fabrication of evidence by the police does not state a claim for the deprivation of the victim's Fourth Amendment [rights] that is actionable under Section 1983 can survive the aforementioned nine cases.
>
> Some good may come of this Rule 11 proceeding, if the court finally does specify why the three decisions of the Supreme Court . . . and the six decisions of the Seventh Circuit . . . do not require alteration of the court's April 28, 1994 ruling reaffirmed in its April 13, 1995 order that fabrication of evidence by the police is not a deprivation of a person's Fourth Amendment rights remediable under 42 U.S.C. § 1983.

Response to Order to Show Cause at 8. He then addressed the district court's ruling that his motion to alter or amend the April 18 order was moot, commenting that he did not understand why the motion was moot insofar as he had not abandoned his claim and the controversy over the fabrication claim remained a live controversy. *Id.* at 10. He added:

> [T]o ensure that the error of dismissal of the Fourth Amendment fabrication of evidence claim and the fact that the court has been specifically presented with the three Supreme Court cases and six Seventh Circuit cases was preserved for appeal, plaintiff's counsel again included the claim in the second amended complaint.
>
> If the court refused to rule on the claim, and more importantly the applicability of the nine cases sustaining it, then it was the result of the court's avoidance of the issue, not any abandonment or waiver, which the mootness ruling suggested.
>
> The claim was again considered in the second amended complaint, so there can be no question of mootness of the issue on appeal. Plaintiff's counsel has satisfied his duties as counsel in preserving the question, even though he has gained no answer as to why the court refuses to address the applicability of these nine cases.

Id.[3]

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[3] Steagall also moved for oral argument on the Order to Show Cause, suggesting that he had a due process right to confront his "accuser," Judge McDade, and that oral argument

Judge McDade found no merit in Steagall's various contentions and imposed a sanction of censure on him, concluding:

> In the Court's view, counsel finds it difficult to accept adverse rulings. This is not the first time that counsel has been hostile to and openly disrespectful of opinions which go counter to his wishes. All too frequently during argument he will bluntly warn the court, presumably from a perception of superior knowledge about federal Constitutional issues, that decisions rendered are wrong and will be reversed on appeal. The Court does not appreciate such intimidating tactics and has cautioned counsel that it would not be moved by such threats of appeal. Counsel must realize that the Court – every court – does its best to make correct decisions and once made, counsel is expected to respect (hopefully gracefully) the decision and act accordingly.
>
> In considering the nature of an appropriate sanction, the Court has decided that a censure is sufficient at this time to deter repetition of this type of conduct by counsel and others similarly inclined. The Court is aware that counsel is a seasoned and respected attorney. It is possible that he does not really understand or appreciate how unseemly his conduct and how – even if unintended – it shows disrespect for the courts

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was necessary to ensure that he was able to "state his position and pose appropriate questions to the Court to ensure that he has adequately made his record on appeal in the event the Court were to rule adversely on the Order to Show Cause." Motion for Oral Argument on Order to Show Cause at 3.

> and the administration of justice. Future transgressions will not be treated with this degree of leniency.

Order (May 17, 1995) at 3.

The underlying litigation continued and after discovery had been conducted, Steagall sought to add additional claims against Captain Karsted. Because the district court had granted summary judgment in favor of defendants on Serritella's conspiracy claim (the only claim naming Karsted as a defendant), Steagall filed a motion – on November 17, 1995 – to alter or amend the April 19, 1995, summary judgment order, so as to allow him to assert the additional claims against Karsted. The motion to amend noted that "Plaintiff continues to believe that the court's April 19, 1995 order entering summary judgment in favor of defendants was reversible error for the reasons set forth in Part III of the Plaintiff's Notice of Additional Claims." Along with the motion to amend, Steagall submitted a notice of additional claims, which, as the name implies, set out the nature of and bases for the proposed additional claims. The notice of additional claims also included a section captioned "THE COURT'S APRIL 19, 1995, SUMMARY JUDGMENT ORDER WAS ERRONEOUS AND SHOULD BE VACATED." This section of the notice acknowledges that the court's April 19, 1995, order granting partial summary judgment is "law of the case until reversed"; nevertheless, Steagall took the opportunity to argue that the April 19 order was "reversible error" and that "the proper course is an order vacating that summary judgment orders of April 28, 1994 and April 19, 1995." He repeated once again his position that fabrication of evidence by the police constitutes a Fourth

Amendment violation and he also advanced several reasons why the district court's April 19, 1995, order granting partial summary judgment was erroneous. In an order dated January 8, 1996, Judge McDade denied the motion to alter or amend because plaintiff failed to show why the purported newly discovered evidence could not have been discovered during the pendency of the summary judgment motion.

Steagall's next volley was to submit a motion to Judge McDade asking, *inter alia*, for the court to rule on whether the denial of plaintiff's motion to alter or amend the April 19, 1995, order precluded him from including the proposed new claims against Captain Karsted in the final pre-trial order.[4] Judge McDade responded with an order indicating that Steagall could not raise the issues in the final pre-trial order; rather, they could only be added to the litigation through amendment of the second amended complaint. Order (January 31, 1996) at 3. Steagall's motion to amend was denied by a magistrate judge who found that the motion was "untimely, not diligent, and [lacking] 'good cause.' " See 2/13/96 Minute Order. Steagall "appealed" the decision to Judge McDade, who affirmed on the same grounds. See 2/27/96 Minute Order. Next, Steagall filed a "Motion for Circuit Rule 50 Findings on Denial of Plaintiff's Motion for Leave to

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[4] Here Steagall was invoking *Ash v. Wallenmeyer*, 879 F.2d 272, 274 (7th Cir.1989), wherein the Court remarked "[t]he federal rules do not contemplate that parties will amend their pleadings to reflect new information obtained in the discovery process. The information is to be reflected in the framing of issues in the pretrial order, which supersedes the complaint."

Amend Second Amended Complaint." The motion contained remarks such as:

> The lack of specific findings, the absence of any valid objection to the proposed amendments, and the fact that both the Magistrate Judge and District Judge ruled on the motion without awaiting any response from the defendants raise serious questions about whether plaintiff has received the even handed application of the Federal Rules of Civil Procedure in this action that is his right.
>
> * * *
>
> The ultimate question to be asked is why is there such hostility to consideration of the merits of plaintiff's claim against Trooper Markum's supervisor, Captain Karsted, who if the claim is to be believed – as it must at this stage of the litigation – is the true cause of abuse of authority charged in the second amended complaint.

Motion for Circuit Rule 50 Findings at 2, 4.

Thereafter Judge McDade issued an order explaining that because plaintiff failed to show why he could not with reasonable diligence have discovered and produced the evidence regarding Captain Karsted during the pendency of the summary judgment motion, the motion to amend the second amended complaint was untimely, lacked diligence and was without good cause. Judge McDade further stated that Captain Karsted would be unduly prejudiced because the court's April 19, 1995, order granted summary judgment in favor of Karsted as to all claims asserted against him. Finally, Judge McDade issued the following warning:

> [C]ounsel for plaintiff is advised that the Court finds it both unprofessional and tiresome to have its integrity regularly impugned – either directly or indirectly – by counsel in response to any adverse ruling made by the court as to plaintiff's case. Moreover, this is not the first time this Court has had to caution counsel in this regard. Again, counsel is reminded that if he concludes that the Court's judgments and decisions are legally incorrect, he should patiently utilize the appropriate channels of appeal. Counsel's continued pursuit of what the Court considers contemptuous conduct under Local Rule 1.3 will not be tolerated in the future.

Order (March 1, 1996).

Meanwhile, on February 15, 1996, the parties filed a final pre-trial order. In that order, Steagall included the proposed new claims against Karsted, notwithstanding Judge McDade's January 31, 1996, order instructing Steagall that the claims should not be included in the final pre-trial order. In addition to listing a number of factual issues relating to the proposed claims against Karsted, Steagall also identified as a contested issue of law, "Whether plaintiff's claims against Captain Karsted are properly before the court." Pre-Trial Order (Feb. 15, 1996) at 7. About two weeks later, Judge McDade issued a minute order setting a final pre-trial conference for March 22, 1996, directing the parties to file, by March 18, 1996, a revised pre-trial order deleting any claims against Karsted consistent with the court's prior orders, and restricting the disputed issues of fact to factual elements of the claim to be tried to the jury (*i.e.*, Serritella's Fourth Amendment claim against Markum).

Steagall filed two motions to continue the final pre-trial conference, the first of which was granted (continuing the conference to May 24, 1996, with the revised final pre-trial order due on May 20, 1996). On May 21, 1996, Steagall filed a motion for leave to submit the revised final pre-trial order on May 22, 1996. That motion explained that Steagall had logistic difficulties preventing him from completing the revised order, and included the following statement: "The undersigned is satisfied with the Final Pre-Trial Order presently on file. It is capable of use even though the court will not allow plaintiff to proceed against Captain Karsted as a defendant at trial." Steagall requested that the district court either allow him to submit a draft of the revised order on May 22, 1996, or allow the previously filed pre-trial order to be used at trial. The court allowed Steagall to file the revised order on May 22. On that day, because the parties could not agree on the statement of contested facts or statement of contested issues of law, Steagall submitted two pre-trial orders, one prepared by him and the other prepared by defense counsel. Steagall's order again set forth facts relevant to the rejected claims against Karsted.

At the pre-trial conference, Judge McDade asked Steagall if he recalled the court's order requiring that claims against Karsted be deleted and the disputed issues of fact be restricted to the factual elements of the claims to be tried to the jury. Steagall responded: "Yes. And my pretrial order is my version of what I think the jury should hear, and until there's a motion in limine I am not going to back off that, or otherwise I would waive substantial rights of my client." After further colloquy with both counsel, Judge McDade concluded:

> Well, this is very difficult for the Court because the Court expects counsel to comply with the Court's orders in good faith. And the Court isn't perfect. The Court makes mistakes, that's why we have appellate courts. But it seems to me from my examination of the old pretrial order and this pretrial order submitted by Mr. Steagall there's very little difference, and there has not been a substantial compliance with my order of February 27, 1996.
>
> * * *
>
> I've admonished you in the past about complying with the Court's order. I've censured you already for violating the Court's order. No, that isn't true, for a Rule 11 violation. And I've also previously admonished you that you may disagree with the Court but there is an appropriate way to disagree and that is by appealing the Court's decision at the appropriate time and not by the repeated efforts by you to circumvent or just simply to refuse to comply with the Court's lawful orders.

Transcript of May 24, 1996, Proceedings at 12-13. Thereafter the court issued a rule to show cause why Steagall should not be held in criminal contempt for his failure to comply with the court's February 27 order. The court also found that Rule 11 was implicated by Steagall's inclusion of the Karsted material because the court's time as well as that of the defendants had to be taken up in order to "deal with this issue of the final pretrial order which does not comply with the court's direction." *Id.* at 18. The court also found that Steagall's inclusion of the fabrication of evidence claim as a contested issue of law in the final pre-trial order violated Rule 11. Accordingly, the

court directed Steagall to show cause why he should not be sanctioned under Rule 11.

On June 6, 1996, Steagall filed a response to the order to show cause. On June 11, 1996, the district court imposed a Rule 11 monetary sanction in the amount of $1,500 for including in the revised final pretrial order – after having been specifically directed by the district judge to delete them – "matters which have no bearing on the pretrial order and are not issues in the case for purposes of the pretrial order." Steagall now appeals that sanction as well as his May 17, 1995, sanction of censure.[5]

ANALYSIS

We review the district court's imposition of sanctions under Rule 11 for abuse of discretion. *Anderson v. County of Montgomery*, 111 F.3d 494, 501 (7th Cir.1997).

Appeal from May 17, 1995, order

The appeal from the May 17, 1995, order was through a notice of appeal filed by Steagall on July 8, 1996. Since that order was not appealed within 30 days as required by Federal Rules of Appellate Procedure (Rule 4(a)(1)), the appeal is dismissed as untimely.

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[5] Steagall moved to dismiss the criminal contempt proceedings on double jeopardy grounds. Judge McDade denied that motion. Then, on April 19, 1997, Judge McDade dismissed the criminal contempt charges *sua sponte*. Accordingly Steagall's separate appeal of Judge McDade's order denying dismissal of the criminal contempt proceedings was voluntarily dismissed on May 14, 1997.

Steagall attempts to overcome the untimeliness of this appeal by arguing that the May 17 censure order is inextricably intertwined with the district court's subsequent monetary sanction and that in order to review the latter (which we shall momentarily), we must review the former. This argument is meritless. Although the June 11 monetary sanction was preceded by the earlier censure order for similar conduct, the monetary sanction was not dependent upon the censure order. In the first place, quite separate conduct was involved. Moreover, there is no requirement that district judges employ a regime of progressive sanctions to get their points across to recalcitrant attorneys. As we have explained in the past (in circumstances involving more severe sanctions than were imposed here), "we have not found the imposition of less drastic sanctions to be an absolute prerequisite to the entry of a default judgment. . . . A district court is not required to fire a warning shot." *Hal Commodity Cycles Management Co. v. Kirsh*, 825 F.2d 1136, 1139 (7th Cir.1987). See also *Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1366 (2d Cir.1991) ("Parties and counsel have no absolute entitlement to be 'warned' that they disobey court orders at their peril."). That Steagall chose to ignore Judge McDade's warnings does not make those warnings inextricably intertwined with the final blow. The censure order was complete and final in and of itself and if review was to be sought of that order it should have been timely sought.[6]

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[6] Although we decline to reach the merits of this untimely appeal, it should be noted that Steagall's concern that he was required to replead the dismissed claim lest he be found to have waived the issue on appeal has no foundation in the law of this

Appeal from the June 11, 1996, order

The notice of appeal from the June 11, 1996, order was filed on July 8, 1996, and is timely. In this Circuit, an order imposing Rule 11 sanctions against an attorney for a party who has participated in pending litigation is immediately appealable. *Frazier v. Cast*, 771 F.2d 259 (7th Cir.1985). The Second, Eighth, Ninth and Eleventh Circuits are in accord.[7] Therefore we will proceed to consider this matter before final judgment in the Serritella case.

As the facts recounted above reveal, the sanction of $1,500 was imposed upon Steagall because he submitted a pre-trial order that was not in conformity with the explicit directions of Judge McDade. Indeed, plaintiff's counsel admitted that he raised issues which had been decided against him by the district court.

Circuit (or any other of which we are aware). A panel of this Court squarely addressed the issue in *Bastian v. Petren Resources Corp.*, 892 F.2d 680 (7th Cir.1990), certiorari denied, 496 U.S. 906, 110 S.Ct. 2590, 110 L.Ed.2d 270, where the panel explained that failure to replead a dismissed claim "is not waiver[.][I]t is prudence and economy [ ] for parties not to reassert a position that the trial judge has rejected. Had the plaintiffs repleaded their . . . charge . . . , the judge would have dismissed the charge, not only with prejudice but with annoyance." *Id.* at 683.

[7] *See, e.g., Cheng v. GAF Corp.*, 713 F.2d 886 (2d Cir.1983); *Sanko S.S. Co. v. Galin*, 835 F.2d 51 (2d Cir.1987); *Crookham v. Crookham*, 914 F.2d 1027 (8th Cir.1990); *Optyl Eyewear Fashion International Corporation v. Style Companies*, 760 F.2d 1045, 1047 n. 1 (9th Cir.1985); *Transamerica Commercial Fin. Corp. v. Banton, Inc.*, 970 F.2d 810 (11th Cir.1992); *DeSisto College, Inc. v. Line*, 888 F.2d 755 (11th Cir.1989), certiorari denied, 495 U.S. 952, 110 S.Ct. 2219, 109 L.Ed.2d 544.

Judge McDade thoroughly explained the reasons why he imposed a $1,500 penalty. We quote his remarks at length because we fully concur with his appraisal of the issue:

> This Court found in its May 17, 1995, Order disposing of the Rule 11 issue that Rule 11 sanctions were appropriate. A copy of the Court's May 17, 1995, Order is appended which explains why Rule 11 was violated and concluded that in consideration of clearly controlling law, the conduct by Mr. Steagall was presented for the improper purpose to harass or to cause unnecessary delay or needless increase in the cost of litigation. In defense of his conduct, Mr. Steagall argued that he had to reallege the claim in his Second Amended Complaint so that it would not be waived on appeal. The Court found that this was a spurious argument and had no support in law. Indeed the Court pointed out that "it was clearly decided in *Bastian v. Petren Resources Corp.*, 892 F.2d 680, 682 (7th Cir.), cert. denied, 496 U.S. 906, 110 S.Ct. 2590, 110 L.Ed.2d 270 (1990), that dismissed claims need not be included in an amended complaint because the final judgment brings up all previous rulings in the case." The Court went on to observe:
>
> > [C]ounsel finds it difficult to accept adverse rulings. This is not the first time that counsel has been hostile to and openly disrespectful of opinions which go counter to his wishes. All too frequently during argument, he will bluntly warn the Court, presumably from a perception of superior knowledge, about federal constitutional issues, that decisions rendered are wrong and will be reversed on appeal. The Court does not

> appreciate such intimidating tactics and has cautioned counsel that it would not be moved by such threats of appeal. Counsel must realize that the Court – every court – does its best to make correct decisions and, once made, counsel is expected to respect (hopefully gracefully) the decision and act accordingly.

In imposing a sanction, the Court only censured Mr. Steagall speculating that Mr. Steagall perhaps did not realize what he was doing and how unseemly his conduct, and how it showed disrespect for the Court and the administration of justice. The Court, however, issued a warning that "future transgressions will not be treated with this degree of leniency." Now, Mr. Steagall is back before the Court under analogous circumstances. Essentially, he has again replead matters which have no bearing on the pretrial order and are not issues in the case for purposes of the pretrial order. Again Mr. Steagall attempts to justify his conduct by arguing that such repleading is necessary to preserve the record. Obviously, Mr. Steagall did not get the message clearly transmitted by this Court earlier. Having been put on notice as to the inappropriateness of unnecessarily repleading issues which are no longer issues in the case, it is apparent counsel failed or refused to make sure of the legal basis for his treatment of the pretrial order as the means of preserving evidentiary issues for purposes of appeal. Obviously, a censure is not enough to coerce Mr. Steagall to comply with the dictates and spirit of Rule 11. Therefore, the

> Court hereby imposes a monetary sanction of fifteen hundred dollars ($1,500.00).

Order (June 11, 1996) at 10-11.

In basing his decision on the foregoing analysis, the district judge was well within his discretion in imposing Rule 11 sanctions and we conclude that the monetary sanction of $1,500 was appropriate. Steagall deliberately disregarded a proper direction by Judge McDade without any compelling justification for doing so, resulting in the needless expenditure of time (and therefore money) by both the parties and the court.

Conclusion

The appeal from the May 17, 1995, order censuring appellant is dismissed as untimely. The June 11, 1996, order is affirmed.

APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: July 9, 1997

BEFORE: Honorable Walter J. Cummings,
Circuit Judge

Honorable Kenneth F. Ripple,
Circuit Judge

Honorable Ilana Diamond Rovner,
Circuit Judge

No. 96-2697

GERARD A. SERRITELLA,
Plaintiff

v.

PAUL MARKUM, an Illinois State Trooper in his individual capacity, KEVIN EACK, Counsel to Terry Gainer, Director of the Illinois State Police, in his individual capacity, TERRY GAINER, Director of the Illinois State Police, in his individual capacity, et al.,

Defendants – Appellees

APPEAL OF:
RICHARD L. STEAGALL

Appeal from the United States District Court for the Central District of Illinois, Peoria Division
No. 93 C 1353, Joe B. McDade, Judge

The judgment of the District Court is AFFIRMED in part and DISMISSED in part, in accordance with the

decision of this court entered on this date. Costs shall be awarded to Amicus Curiae Mark T. Dunn.

(1061-110393)

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 29, 1997

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

GERARD A. SERRITELLA,

Plaintiff,

No. 96-2697

vs.

PAUL MARKUM, an Illinois State Trooper, in his individual capacity, KEVIN EACK, Counsel to Terry Gainer, Director of the Illinois State Police, in his individual capacity, TERRY GAINER, Director of the Illinois State Police, in his individual capacity, et al.,

Defendants-Appellees,

APPEAL OF:
RICHARD L. STEAGALL,

Appellant.

Appeal from the United States District Court for the Central District of Illinois, Peoria Division.

No. 93 C 1353

Joe B. McDade, *Judge.*

ORDER

This slip opinion released July 9, 1997, is amended by the revision of footnote 5 to read as follows:

> Steagall moved to dismiss the criminal contempt proceedings on double jeopardy grounds. Judge

McDade denied that motion. Then, on April 19, 1997, Judge McDade dismissed the criminal contempt charges *sua sponte*. Accordingly Steagall's separate appeal of Judge McDade's order denying dismissal of the criminal contempt proceedings was voluntarily dismissed on May 14, 1997.

On July 23, 1997, appellant filed a petition for rehearing. All of the judges on the panel have voted to deny the petition, and it is therefore DENIED.

APPENDIX D

Proceedings include all events. APPEAL
1:93cv1353 Serritella v. Markum, et al MISDDL

9/14/93	1	COMPLAINT (summons(es) issued) case referred to mag. Judge Robert J. Kauffman. Cert. of interest/Mag consent forms given to Pltf. Atty. by Clerk. (HW) [Entry date 09/21/93]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

GERARD A. SERRITELLA, Plaintiff, v. PAUL MARKUM, an Illinois State Trooper in his individual capacity, and KEVIN EACK, Counsel to TERRY GAINER, Director of the Illinois State Police, in his individual capacity, Defendants.	)	Case No. 93-1353 (Filed April 28, 1994)

ORDER

In the original complaint, Plaintiff Gerald Seritella, asserted a claim under 42 U.S.C. § 11983 for an unlawful arrst in violation of his fourth Amendment rights, alleging that Defendant, Officer Markum, did not have probable cause to arrest him for speeding and DUI. Plaintiff claimed that his Fourth Amendment rights to be secure from unreasonable searches and seizures were violated by Defendant Markum's conduct in fabricating evidence of the breathalyzer test results leading ot his arrest. Finally, Plaintiff claimed that his First Amendment rights were violated when Defendants Eack and Markum conspired ot arrest him in retaliation for the exercise of his first Amendment rights to speech, association with his clients, and access to the courts on behalf of his client.

* * *

Plaintiff's claim that this action is barred by collateral estoppel. That legal argument may properly be raised later in these proceedings. Therefore, paragraphs 14-18 are not immaterial. They are also not prejudicial, because any determination with respect to the collateral estoppel issue is a matter of law for the court; a jury will never see this claim. Although paragraphs 38 and 39, as pled, consist of legal argument, they are not prejudicial for the same reasons and therefore, do not meet the standards for granting a motion to strike under F.R.Civ.P. 12(f). *Simmons v. John F. Kennedy Medical Center*, 727 F. Supp. 440, 442 (N.D.Ill. 1989).

Defendants have also moved to strike paragraphs 21 and 40. Defendants complain that paragraph 21 fails to state a cause of action. In paragraph 21, Plaintiff alleges that he was deprived of his Fourth Amendment right to be free from unreasonable searches and seizures by Officer Markum's alleged fabrication of evidence. Fabrication of evidence is not a Fourth Amendment concern and is therefore not a properly pled claim under § 1983, and Defendants' Motion to Strike is therfore allowed.

Several comments regarding paragraph 21, viewed in the context of paragraphs 19 and 20, are in order. Plaintiff's convoluted pleadings obscures [sic] the real nature of his claim which basically is one for malicious prosecution over which the Court has supplemental jurisdiction under 28 U.S.C. § 1367. Essentially Plaintiff is complaining that he was arrested and prosecuted without probable cause and that evidence was fabricated by Defendants to facilitate his prosecution in retaliation for Plaintiff's providing legal representation to a former state police officer in a suit against a high state police official. Plaintiff's

attempt to give a First or Fourth Amendment cloak of protection to what simply is a state claim for malicious prosecution is unavailing. Under Illinois state law, the elements of the tort of malicious prosecution are: (1) institution and prosecution of judicial proceedings by defendant; (2) lack of probable cause for those proceedings; (3) malice in instituting the proceeding; (4) termination of the prior cause in plaintiff's favor; and, (5) damages. *See Bentley v. City of Chicago,* 79 Ill. App. 3d 1038.

Whether a malicious prosecution action may be brought under § 1983 was an open question in the Seventh Circuit until *Albright v. Oliver,* 975 F.2d 343, 347 (7th Cir. 1992), where it was held that such a claim could not be brought in the absence of incarceration or other palpable consequences. The Supreme Court affirmed this decision in *Albright v. Oliver,* 114 S.Ct. 807 (1994), although upon different grounds. *See also Cruz v. Stasinopoulos,* 843 F. Supp. 435 (N.D.Ill. 1994). There are no allegations by Plaintiff that he was incarcerated or suffered some other palpable consequence which would differentiate him from the plaintiff in *Albright.*

Paragraph 40 of Plaintiff's Amended Complaint alleges damages for injuries involving loss of employment time, i.e., the hours Plaintiff could have billed to his clients which were lost in defense of his own case. These injuries would be compensable under a common law theory of malicious prosecution. Accordingly, Defendants' Motion to Strike paragraph 40 is denied.

CONCLUSION

IT IS THEREFORE ORDERED that Defendant's Motion for Partial Summary Judgment (# 9-1) on the issue of qualified immunity for the First Amendment claims alleged in the Amended Complaint is **GRANTED.** IT IS FURTHER ORDERED that Defendants' Motion to Strike (# 16-1) is **GRANTED IN PART** with respect to paragraph 21 of the Amended Complaint and **DENIED IN PART** with respect to paragraphs 14-18, 38, 39, and 40. Defendants' Motion to Strike (#7-1) is **MOOTED by** (# 16-1). Plaintiff will be allowed fourteen days to replead paragraph 21 in accordance with the legal principles discussed in this order.

Having resolved the issue of qualified immunity, IT IS FURTHER ORDERED that the stay on discovery be lifted. Accordingly, Plaintiff's recent Motion to Alter or Amend the Court's November 3, 1993 Order Staying Discovery (#27-1); Plaintiff's Motion for a Hearing on the Motion **to Alter or Amend** (# 28-1); and Plaintiff's Motion to Strike Defendant's Response to the Motion to Alter or Amend (# 31-1) are **MOOT.** This case is referred to the Magistrate for further proceedings consistent with this order.

ENTERED this 28th day of April, 1994.

/s/ Joe B. McDade
JOE B. McDADE
United States District Judge

Proceedings include all events. APPEAL
1:93cv1353 Serritella v. Markum, et al MISDDL

5/12/94	34	MOTION by plaintiff Gerald A Serritella to Alter or amend April 28, 1994 Order (hw) [Entry date 05/16/94]
5/17/94	36	MOTION by plaintiff Gerald a Serritella for leave to file Memorandum in Support of Motion to Alter or Amend 4/28/94 Order (hw) [Entry date 05/18/94]
5/17/94	37	MOTION by plaintiff Gerald A Serritella for hearing/for Oral Argument on Pltf's. Motion to Alter or Amend 4/28/94 Order Before District Judge (hw) [Entry date 05/18/94]
5/23/94	–	MINUTE-ENTRY: by Judge Joe B. McDade. The minute entry dated 5/13/94 denying Pltf's. motion to extend time to file a memoranum in suuport [sic] of his motion to alter or amend[35] was intended to moot #34, 36 & 37. ACCORDINGLY IT IS ORDERED that this Crt. finds the motion for hearing/for Oral Argument on Pltf's. Motion to Alter or Amend 4/28/94 Order Before District Judge [37-1] moot., finding the motion for leave to file Memorandum in Support of Motion to Alter or Amend 4/28/94 Order [36-1] moot., finding the motion to Alter or amend April 28, 1994 Order [34-1] moot. a copy of the minute entry should be directed to Mag. Judge Evans' attention. (cc: all counsel) (hw)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

GERARD A. SERRITELLA Plaintiff, v. PAUL MARKUM, an Illinois State Trooper in his Individual Capacity; KEVIN EACK, Counsel to Terry Gainer, Director of the Illinois State Police, in his Individual Capacity; TERRY GAINER, Director of the Illinois State Police, in his Individual Capacity; KEITH KARSTED, then Captain of the Illinois State Police, District #8 in his Individual Capacity; and STEPHEN JOHNSON, Master Sergeant of the Illinois State Police, District #8 in his Individual Capacity, Defendants.	)	Case No. 93-1353 (Filed Apr. 19, 1995)

ORDER

Before the Court is Defendants' Motion for Partial Summary Judgment on Claim B (Fourth Amendment claim) and Claim C (conspiracy to violate Plaintiff's Fourth Amendment and First Amendment rights) of the Second Amended Complaint.[1] [Doc. #55]. Plaintiff has

[1] The remaining Fourth Amendment claim for false arrest is not involved in this motion.

filed a response in opposition to Defendants' motion. [Doc. #59]. For the reasons stated below, Defendants' motion is granted.

BACKGROUND

On August 9, 1993, Defendant Markum, an Illinois State Police officer, arrested Plaintiff, Jerry Serritella, for speeding and driving while under the influence of alcohol. Plaintiff, who is a lawyer, contends that his arrest was based on fabricated evidence and was in retaliation for his representation of a client involved in a dispute with Defendant Terry Gainer, the Director of the Illinois State Police. Consequently, Plaintiff has filed a 42 U.S.C. § 1983 action in this Court alleging that Defendants have deprived him of various constitutional rights.

LEGAL STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there is no *genuine* issue of *material* fact.

As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

As to genuine issue, summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). As stated in *Anderson*, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. When a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial. There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, or is no more than a scintilla, a summary judgment may be granted.

ANALYSIS

Claim B

Defendants seek summary judgment as to Claim B of Plaintiff's Second Amended Complaint. The Court notes that Claim B (paragraph 25) of Plaintiff's Second

Amended Complaint is identical to Claim B (paragraph 21) of Plaintiff's First Amended Complaint. This Court in its Order of April 28, 1994, struck Claim B (paragraph 21) from Plaintiff's Amended Complaint deciding that fabrication of evidence (under the circumstances alleged in the pleading and supported by summary judgment evidence) is not a Fourth Amendment concern and, consequently, was not a properly pled Fourth Amendment claim under 42 U.S.C. § 1983. [Doc. #33 at 19]. *See Buckley v. Fitzsimmons*, 20 F.3d 789, 797 (7th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 740 (1995) (The Seventh Circuit quoted from Justice Scalia's concurring opinion in *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S.Ct. 2606, 2620 (1993), that there is "no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution.").

In addition, the Court finds that Claim B is merely a restatement of Plaintiff's Fourth Amendment claim pled in Claim A (paragraphs 23-24). Characterizing the arresting officer's actions and reasons for stopping and arresting Plaintiff for speeding and driving under the influence of alcohol as "fabrication of evidence" is just another way of saying that Trooper Markum did not have probable cause to stop and arrest him, the crux of Claim A. In other words, a separate and independent claim is not created by this bit of sleight-of-hand. These two claims are one and the same. Furthermore, there are no allegations or arguments made that Plaintiff was deprived of a fair trial by use of the the [sic] alleged fabricated evidence which might distinguish it from the false arrest

claim. *See Buckley v. Fitzsimmons,* 115 S.Ct. at 2620. Plaintiff fails to cite and the Court finds no authority contrary to its April 28, 1994, Order as to Claim B.[2] Therefore, Defendants' motion for summary judgment as to Claim B of Plaintiff's Second Amended Complaint is granted.

Furthermore, the Court finds that Plaintiff's refiling of an identical claim in the Second Amended Complaint subsequent to an Order filed by the Court striking the claim as not presenting a cognizable section 1983 claim is subject to Rule 11 sanctions under the Federal Rules of Civil Procedure. Plaintiff's insistence upon repleading a claim after rejection by the Court is the sort of conduct Rule 11 was meant to regulate. Under Rule 11(b)(1), the Court is disposed to find that Count B of Plaintiff's Second Amended was "presented for [the] improper purpose, . . . [of] caus[ing] unnecessary delay or needless increase in the cost of litigation." Consequently, under Rule 11(c)(1)(B)(b) Plaintiff is ordered to show cause why

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[2] Plaintiff also indicates that he believes that "[t]he rationale of the court's April 28, 1994 ruling that the Fourth Amendment does not encompass police fabrication of evidence was apparently the existence of state tort remedies." [Doc. #59 at 9]. It is obvious that Plaintiff does not understand the Court's April Order. The basis of the Court's decision was not that because state tort remedies were available a constitutional claim is unavailable. Rather, the Court found that a constitutional claim did not exist and that Plaintiff was attempting to assert a cause of action based on a state action for malicious prosecution as a constitutional violation which is problematic at best. *See Albright v. Oliver,* 975 F.2d 343, 347 (7th Cir. 1992), aff'd on other grd's, 114 S.Ct. 807 (1994); *Cruz v. Stasinopoulos,* 843 F.Supp. 435 (N.D. Ill. 1994).

his conduct has not violated Rule 11(b)(1) and why sanctions should not be imposed.

IT IS THEREFORE ORDERED that Defendants' Motion for Partial Summary Judgment as to Claims B and C of Plaintiff's Second Amended Complaint [Doc. #55] is **GRANTED.**

IT IS FURTHER ORDERED that, pursuant to Rule 11(c)(1)(B)(b) of the Federal Rules of Civil Procedure, Plaintiff's counsel is ordered to show cause within seven (7) days of entry of this Order why Rule 11 sanctions should not be imposed against him.

The case is referred back to Magistrate Judge Evans for further proceedings with reference to the sole remaining claim alleged in Claim A.

ENTERED this 19th day of April, 1995.

/s/ Joe Billy McDade
JOE BILLY McDADE
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

GERARD SERRITELLA, Plaintiff, v. PAUL MARKUM, et al., Defendant.	)	Case No. 93-1353 (Filed May 17, 1995)

ORDER

On April 19, 1995, this Court issued an Order to Show Cause why Plaintiff's counsel should not be subject to Rule 11 sanctions for refiling an identical claim in the Second Amended Complaint subsequent to an order filed by the Court striking this claim from the Amended Complaint as not stating a cognizable claim. [Doc. #67]. Plaintiff's counsel has filed a Response to the Order to Show Cause. [Doc. #69]. In addition, Defendants have filed a Memorandum in Reply to Plaintiff's Response to the Court's Order to Show Cause. [Doc. #72].

Having reviewed the response of Plaintiff's counsel, the Court finds that Rule 11 sanctions are appropriate. The Court finds that under Rule 11 sanctions are appropriate. The Court finds that under Rule 11(b)(1), Claim B of the Second Amended Complaint was presented for the improper purpose "to harass or to cause unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P. 11(b)(1). In his response, Plaintiff's attorney concedes that the claims as alleged in the two complaints were identical but then attempts to explain that they are

not identical by confusing the Court's findings on another claim with the analysis on Claim B. The Court can discern absolutely no merit in such an inane argument.

Next, Plaintiff's counsel attempts to reargue why Claim B does state a cognizable claim that would entitle Plaintiff to relief. The Court has addressed this issue on two previous occasions. It is apparent that Plaintiff's counsel still purports not to understand the Court's decision that fabrication of evidence in and of itself does not violate the Constitution. Nevertheless, realizing that any further explication of this issue for the benefit of Plaintiff's attorney would be futile, the Court will not revisit this issue. Any further discourse concerning this issue will have to await appellate review.

Plaintiff's counsel also asserts that he had to reallege this issue in his Second Amended Complaint so that it would not be waived on appeal. The Court is extremely concerned that an attorney admitted to practice in this court would have such a fundamental misunderstanding of how a claim is preserved for appeal. It was clearly decided in *Bastian v. Petren Resources Corp.*, 892 F.2d 680, 682 (7th Cir. 1990), that dismissed claims need not be included in an amended complaint because the final judgment brings up all previous rulings in the case. Because Plaintiff's counsel has failed to set forth any justifiable or good faith reason for reasserting a claim which is identical to a claim previously struck by the Court, the Court finds that Rule 11 has been violated.

In the Court's view, counsel finds it difficult to accept adverse rulings. This is not the first time that counsel has

been hostile to and openly disrespectful of opinions which go counter to his wishes. All too frequently during argument he will bluntly warn the Court, presumably from a perception of superior knowledge about federal Constitutional issues, that decisions rendered are wrong and will be reversed on appeal. The Court does not appreciate such intimidating tactics and has cautioned counsel that it would not be moved by such threats of appeal. Counsel must realize that the Court – every court – does its best to make correct decisions and once made, counsel is expected to respect (hopefully gracefully) the decision and at accordingly.

In considering the nature of an appropriate sanction, the Court has decided that a censure is sufficient at this time to deter repetition of this type of conduct by counsel and others similarly inclined. The Court is aware that counsel is a seasoned and respected attorney. It is possible that he does not really understand or appreciate how unseemly his conduct and how – even if unintended – it shows disrespect for the courts and the administration of justice. Future transgressions will not be treated with this degree of leniency.

IT IS THEREFORE ORDERED that Petitioner's counsel is censured as a sanction under Rule 11 of the Federal Rules of Civil Procedure.

ENTERED this 17th day of May, 1995.

/s/ Joe Billy McDade
JOE BILLY McDADE
United States
District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

GERARD A. SERRITELLA, Plaintiff,	)	
v.	)	Case No. 93-1353
PAUL MARKUM, et al., Defendants.	)	(Filed Jan. 08, 1996)

ORDER

Plaintiff's Motion to Alter or Amend this Court's April 19, 1995 Order Entering Summary Judgment in Favor of Defendant, Keith Karsted [Doc. #84] is denied.

A motion to reconsider serves only to correct manifest errors of law or fact or to present newly discovered evidence. *Keens* [sic] *Corp. v. International Fidelity Ins. Co.*, 561 F. Supp. 656, 665 (N.D. Ill. 1982), *aff'd*, 735 F.2d 1367 (7th Cir. 1984); *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985). Plaintiff does not present any new or compelling legal arguments in his motion to reconsider or seek to correct a manifest error of law or fact. Plaintiff does assert, however, that subsequent to this Court's April 19, 1995 Order that Plaintiff has found new evidence establishing the basis for three additional claims against Captain Karsted.

Motions to reconsider "cannot . . . be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion." *Keene*, 561 F. Supp. at 665. A movant – in a motion for reconsideration of a grant of summary judgment based on newly discovered evidence – is "obliged to

show not only that this evidence was newly discovered or unknown to it until after [the pendency of the motion], but also that it could not with reasonable diligence have discovered and produced such evidence [during the pendency of the motion]." *Engelhard Indus. Inc. v. Research Instrumental Corp.*, 324 F.2d 347, 352 (9th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964). In his motion, Plaintiff has failed to show why he could not with reasonable diligence have discovered and produced such evidence during the pendency of the motion. Consequently, Plaintiff's motion for reconsideration of this Court's April 19, 1995 Order on the basis of newly discovered evidence is denied. Plaintiff also reargues various claims that have been sufficiently addressed in previous orders. Further, Plaintiff contends that the Court improperly decided a number of credibility issues regarding the existence of a conspiracy among the Defendants. Plaintiff is incorrect in contending that the Court made any credibility determinations. Rather, the Court held that "Plaintiff has failed to present sufficient evidence demonstrating the existence of a conspiracy." [Doc. #67 at 14].

IT IS THEREFORE ORDERED that Plaintiff's Motion to Alter or Amend this Court's April 19, 1995 Order Entering Summary Judgment in Favor of Defendant, Keith Karsted [Doc. #84] is **DENIED**.

ENTERED this 8th day of January, 1996.

/s/ J.B. McDade
JOE BILLY McDADE
United States
District Judge

2/27/96 – MINUTE-ENTRY: by Judge Joe B. McDade A Final Pretrial conference is set for 9:30 Friday, 3/22/96 at the Federal Building in Peoria in person. By Monday, 3/18/96, the parties shall file a revised pretrial order deleting any claims as to Officer Karsted consistent with this Court's previous orders. Additionally, the parties are to restrict alleged disputed issues of fact to the various factual elements of the claims to be tried before the jury; misc ddl for revised pretrial order by 3/18/96 (cc: all counsel) (sh)

5/22/96 110 NOTICE OF FILING with proposed pretrial orders submitted by both parties (hw) [Entry date 05/23/96]

5/24/96 – MINUTE-ENTRY: by Judge Joe B. McDade Parties present in open court by Atty Steagall w/Pla personally and Attys Corrigan and McNaught for Final Pretrial conference on 5/24/96. Same not held. Evidentiary hrg set for 3:00 Friday, 7/12/96 (in person in Peoria) on the possible criminal contempt of Atty Steagall for violating this Court's 2/27/96 Order in that Atty Steagall failing to delete claims as to Officer Karsted and by failing to restrict alleged disputed issues of fact to the various factual elements of the claims to be tried before the jury. Court believes Atty Steagall has violated Rule 11 by filing a pretrial order that has been presented

for the improper purpose of harrassing or causing unnecessary delay or needless increase in the cost of litigation by raising claims which have been disposed of in prior Orders of this Court and given notice that he should respond in writing by 6/7/96 to the oral notice of violation of Rule 11 in regard to the proposed pretrial order; misc ddl for resp by 6/7/96; Final Pretrial conference continued to 9:15 Fri., 8/2/96 (in person in Peoria) (cc: all counsel) (sh)

* * *

6/5/96 113 MOTION by plaintiff Gerald A Serritella for order to withdraw Plaintiff's Proposed Pre-Trial Order (sh)

6/6/96 114 RESPONSE by movant Richard L Steagall to Rule to Show Cause under Rule 11 (sh) [Entry date 06/07/96]

* * *

6/11/96 115 ORDER by Judge Joe B. McDade. The Court imposes a monetary sanction in sum of $1,500.00 due on or before 7/10/96 as a sanction for this Rule 11 violation. See Order (cc: all counsel) (hw) [Entry date 06/12/96]

7/2/96 116 MOTION by movant Richard L Steagall to dismiss citation for criminal comtempt [sic] (sh)

7/12/96 117	MEMORANDUM IN SUPPORT of motion to dismiss citation for criminal comtempt [sic] [116-1] by movant Richard L Steagall (sh)
7/2/96 –	RECEIPT #022962 in the amount of $1,500 – payment of sanctions by Richard L. Steagall (sh) [Entry date 07/03/96]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

GERARD A. SERRITELLA Plaintiff, v. PAUL MARKUM, an Illinois State Trooper in his Individual Capacity; KEVIN EACK, Counsel to Terry gainer, Director of the Illinois State Police, in his Individual Capacity; TERRY GAINER, Director of the Illinois State Police, in his Individual Capacity; KEITH KARSTED, then Captain of the Illinois State Police, District #8 in his Individual Capacity; and STEPHEN JOHNSON, Master Sergeant of the Illinois State Police, District #8 in his Individual Capacity, Defendants.	)	Case No. 93-1353 (Filed June 11, 1996)

ORDER

On February 15, 1996, the parties submitted to the Court, pursuant to Local Rule 16.1 (formerly 2.11), a proposed final pretrial order relating to the claim to be tried. Examination of the proposed order revealed that it contained issues and covered claims which had already been decided by the Court, either directly or indirectly. Indeed, Plaintiff candidly acknowledged that this was the case. In that regard, Plaintiff specifically stated, "plaintiff

has included the issues from the additional claims disclosed by plaintiff in discovery is plaintiff's notice of additional claims in the pretrial order and moved to amend the plaintiff's second amended complaint to include those claims for trial." (Proposed pretrial order filed Feb. 15, 1996). At the final pretrial conference on February 27, 1996, the Court ordered, "the parties shall file a revised pretrial order deleting any claims as to Officer Karsted consistent with the Court's previous orders. Additionally, the parties are to restrict alleged disputed issues of fact to the various factual elements of the claims to be tried before the jury."

Pursuant to the Order of February 27, 1996, the parties were unable to agree to a proposed revised final pretrial order. Consequently, each party submitted his own version of a proposed final pretrial order in compliance with this Court's Order of February 27, 1996. When questioned about his apparent failure to comply with the February 27, 1996 Order, Plaintiff's counsel, Mr. Steagall, responded, "[t]here is really no surprises, your Honor The issues were the same from the surprises, order." (Transcript of May 24, 1996, hearing at 3). When the content of Plaintiff's proposed pretrial order was challenged by the Court as not complying with the February 27, 1996, Mr. Steagall explained, "my pretrial order is my version of what I think the jury should hear, and until there's a motion in limine I am not going to back off that, or otherwise waive substantial rights of my client." (Transcript of May 24, 1996, hearing at 3). It is clear from this colloquy with the Court that Mr. Steagall did not accept and was not operating under the view that the pretrial order of February 15, 1996, needed to be changed in order

to comply with the Court's Order of February 27, 1996. Mr. Steagall appears to rationalize his non-compliance by arguing that to preserve evidentiary issues for appeal he must set them forth in the pretrial order. In this respect, he asserted: "But, Your Honor, there is a second issue in this case. First is whether Karsted's part of the case. You ruled he isn't. Second is his admissions and his conduct relevant to the issues of false arrest as to the trooper. And I don't have a ruling on that issue, and if I don't submit that in the pretrial order, then I have not preserved my record for that second issue." (Transcript of May 24, 1996, hearing at 4).

The Court then responded: "I don't understand how evidentiary issues have to be issued as part of a pretrial order. You present your witnesses, and if there is objections to their testimony, objections are made, the Court rules. That's the normal procedure." (Transcript of May 24, 1996, hearing at 4).

And again, Mr. Steagall argued to the Court, "But I am supposed to put in the pretrial order my perception of what the contested issues of fact are, and that's what I've done, Your Honor." (Transcript of May 24, 1996, hearing at 4).

This is a specious argument by counsel. There is no case law known to the Court and Plaintiff's counsel does not cite any to suggest that problematic evidentiary material[1] has to be set out in the pretrial order to preserve the

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[1] In order to illustrate what the Court considers as evidentiary material, the Court will use a hypothetical stop of a motorist by a police officer. The basis for the stop is the police

issue for appeal. Such a claim is nonsense. Timely and appropriate objections by counsel at trial to the admission or exclusion of evidence resulting in an evidentiary ruling by the Court is all that is necessary to preserve an evidentiary issue for purposes of appeal. *See* Fed. R. Evid. 103. The Court views this argument by counsel to have no basis in law and if earnestly held, suggests that Mr. Steagall did not make reasonable inquiry and review of applicable law before he filed his proposed final pretrial order. The Court can find no basis in the law – nor has Mr. Steagall's attorney cited any such law – for the legal proposition being claimed by Mr. Steagall. This is a violation of Rule 11 of the Federal Rules of Civil Procedure.

As a result of Mr. Steagall's legally unsupported view of the requirements for preservation of evidentiary rulings for the record, he included in his proposed final pretrial order, numerous evidentiary matters which needlessly complicated the proposed final pretrial order and served only to harass and to cause unnecessary delay and needless increase in the cost of this litigation. A list of these needless evidentiary matters follow:

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officer's belief that the motorist was speeding. This is the disputed issue of fact to be decided by the trier of fact in determining whether the officer had probable cause to stop the motorist. It is through the use of evidentiary materials that one side or the other goes about proving or disproving this disputed issue. The various proofs are the evidentiary material offered at trial to prove or cast doubt on the issue of whether the motorist was speeding.

Contested Issues of Fact

11. Did Captain Karsted intentionally disobey a subpoena for the production of the original of the reel-to-reel tape containing all communications between the command center and Trooper Markum during plaintiff's arrest by falsely stating that he was unable to produce the reel-to-reel tape on September 2, 1992 because it would cause him and his personnel undue burden despite having been told by Kevin Eack, counsel to Terry Gainer, Director of the Illinois State Police, to make sure that the original of the reel-to-reel tape was preserved to deny plaintiff exculpatory evidence and cover up the fact that Trooper Markum had no probable cause to arrest the plaintiff?

12. Did Captain Karsted intentionally allow the original reel-to-reel tape containing all communications between the District #8 command center and Trooper Markum during the arrest of the plaintiff after having made an edited copy to be destroyed because it contained evidence that would have proven that Trooper Markum made a false arrest of plaintiff?

13. Did Captain Karsted know of the experiment on acceleration conducted by Trooper Markum and Raymond McMillan during the recess between the September 2, 1992 session of the hearing on plaintiff's petition to rescind statutory summary suspension before the Circuit Court of Peoria County in *People v. Seritella*, Cas. Nos. 92 TR 17517, 17528, & 17529. and the final September 9, 1992 session?

a. If Captain Karsted knew of the experiment, did he intentionally fail to order

Trooper Dan Law to reconstruct the arrested because he knew or believed that the use of the police reconstruction expert in this experiment would prove that plaintiff was falsely arrested?

b. If Captain Karsted did know of the experiment, was Trooper Law acting without authority in conducting it on the highway?

14. Did Assistant State's Attorney William Loeffel know that Captain karsted was withholding exculpatory evidence by enlisting the Illinois attorney General to file a motion to quash the subpoena for the original of the reel-to-reel tape served on Captain Karsted and violate his duty to turn over exculpatory evidence?

15. Was the reason that Sergeant Dan Law, an expert reconstructionist limited his opinion to the question of whether marks in the emergency lane of the northbound lanes of Illinois Route 6 existed on August 9, 1992 when he was present with Trooper Markum and Raymond McMillan at the time they went to the scene during the recess between the September 2, 1992 and September 9, 1992 sessions of the petition to rescind statutory summary suspension that he knew that it was physically impossible for Trooper Markum to have any idea of the speed of plaintiff's vehicle on August 9, 1992 under any of the three versions to which Trooper Markum testified?

16. Who ordered or gave permission to Dan Law to go to the scene of Illinois Route 6 at the time during the recess between the September 2, 1992 and September 9, 1992 sessions?

17. Did Captain Karsted ever review any of the reports of Trooper Markum of his arrest of Plaintiff or talk with Trooper Markum about the arrest of plaintiff or Judge Borden's order finding Trooper Markum's testimony incredible?

18. Did Captain Karsted learn of Judge Borden's order finding arrest of plaintiff was without probable cause and that Trooper Markum's version of the events lacked credibility and intentionally refuse to take disciplinary action against Trooper Markum when such action was plainly warranted by the accepted standard of care of police administration?

19. Did the original reel-to-reel tape contain evidence favorable to plaintiff?

Contested Issues of Law[2]

1. If the court's April 28, 1994 and April 19, 1995 orders ruling that police fabrication of evidence does not violate the Fourth Amendment are the law of this case, then is there any issue to be tried?

a. This court has issued the following ruling.

(1) On April 28, 1994, the Court ruled that a policeman who fabricated evidence of probable cause for an arrest does not

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[2] Mr. Steagall categorizes the following material as contested issues of law. Upon examination most of them appear to be a litany of rulings he anticipates that will result from him efforts to introduce all of the various evidentiary material into evidence at the trial. Other than this prospect, these are not issues of law in this case.

deprive the person arrested of his Fourth Amendment rights.

(2) In its April 19, 1995 order, it ordered plaintiff's counsel to show cause why he should not be sanctioned for alleging that Trooper Markum and others joined as additional defendants in the amended complaint deprived plaintiff of his Fourth Amendment rights by fabricating evidence of his grounds for probable cause and ultimately censuring plaintiff's counsel for that allegation.

b. Plaintiff intends to prove that Trooper Markum's grounds for probable cause to arrest plaintiff were a total fabrication.

c. Under this court's rulings – which are the law of the case – there is no issue to be tried. This court has ruled that the conduct plaintiff intends to prove is not a deprivation of the Fourth Amendment.

2. Does Trooper Markum's testimony on seven occasions during his testimony given in the September 2, 1992 session of the driver's license hearing (Tr. 24-25, 26, 30, 32, 34, & 39) his testimony on two occasions in the September 9, 1992 session of the driver's license hearing (Tr. 160, 161), and his testimony on one occasion during his deposition taken in this action (Markum dep. 11) constitute a judicial admission which prevents him from giving contrary testimony or is it an evidentiary admission from which he may vary?

3. Does Trooper markum's testimony on three occasions in the September 9, 1992 session of the driver's license hearing (Tr. 118, 160, 161) and

two occasions in his deposition taken in this action (Markum dep. 13, 14) that he accelerated his vehicle from 5 mph to 75 mph in the test he made at a distance .7 miles on the northbound lanes of Illinois Route #6 from the U.S. 150 exit constitute a judicial admission that prevents him from giving contrary testimony or is it an evidentiary admission from which he may vary?

4. Is proof of a policy among policy making police officials of deliberate indifference to the deprivation of constitutional rights by their subordinates relevant and admissible evidence to prove that the individual subordinate police officer acted in conformity with that policy and in fact deprived a plaintiff of his constitutional rights in an action against the police officer individually for conduct in a particular occurrence?

7. Is the question of whether Trooper Markum protected by qualified immunity limited to the second factual prong of the test; i.e. whether a reasonable police officer under these circumstances would believe he had grounds to arrest the plaintiff?

8. Are any of the contested issues of fact apart from par. 1 & 9 relevant to the issues to be tried in the trial?

9. Is the statement of contested issues of fact par. 1 irrelevant as to overbreadth in that Trooper Markum is limited to his stated basis for arresting plaintiff, that he was travelling at 75 mph in his vehicle, a speed in excess of the posted speed limit of 65 mph, which was the reason he stated at the time for his arrest of plaintiff?

10. Is the fact that a vehicle go which is travelling 75 mph passes a second vehicle that is travelling at 0 mph to 5 mph and then accelerates to 75 mph will never catch the first vehicle one of sufficient reliability to allow the court to take judicial notice of that fact?

12. Is plaintiff required to prove that he prevailed at the petition to revoke statutory summary suspension of his driver's license arising out of this arrest in order to recover the loss of income incurred in investigating and defending that action, which ultimately lead to dismissal of all criminal charges against him?

13. Is Trooper Markum's testimony in his deposition in this case that he accelerated his vehicle to a speed of 75 mph when following the vehicle he thought to be the plaintiff's before the August 9, 1992 arrest and to 75 mph in the test performed on Illinois Route #6 with Raymond McMillan and Sergeant Dan Law present a binding judicial admission of those facts?

14. Is plaintiff entitled to a directed verdict on Trooper Markum's lack of probable cause to stop plaintiff's vehicle or arrest or charge him for speeding due to the physical impossibility that a vehicle travelling in front of the second vehicle at a speed of 75 mph can be overtaken by the second vehicle when it accelerates from 5 mph to 75 mph and never to a greater speed?

15. Should the testimony of defendant's witness Richard Smith and Charles Hamilton be excluded due to defendants' failure to disclose the existence of these witnesses in discovery and instead disclosing them on Monday, February 9, 1996 at the time the pre-trial order was being prepared?

> 16. Are the requirements for administration of a breathalyzer test imposed by Illinois law a part of the rule of decision imposed by 42 U.S.C. § 1988 on the admissibility of the results of that particular decision in an action brought to remedy the deprivation of civil rights under 42 U.S.C. § 1983?

(Plaintiff's proposed pretrial order filed May 22, 1996).

Having found that Mr. Steagall violated Rule 11 by submitting his version of the proposed final pretrial order, the Court has to determine the appropriate sanction under Rule 11(c)(2). In that regard, sanction "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(2).[3] This is not the first time the court has found a violation of Rule 11 by Mr. Steagall in needlessly repleading matters which were no longer issues in the case. On April 19, 1995, this Court issued an Order to Show Cause why Mr. Steagall should not be subject to Rule 11 sanctions for refiling an identical claim in the Second Amended Complaint subsequent to an Order field by the Court striking this claim from the Amended Complaint as not stating a cognizable claim.

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[3] Plaintiff seeks to avoid a Rule 11 violation by seeking leave to withdraw the offending proposed final pretrial order thereby obtaining immunity under the "safe harbor" provision of Rule 11(c)(1)(A). There is no safe harbor provision in Rule 11(c)(1)(B), the section of Rule 11 which provides for *sua sponte* notice of rule 11 violations by the Court. Even if the safe harbor provision of section (c)(1)(A) were applicable, Plaintiff's withdrawal of his proposed final pretrial order is untimely and comes too late to avoid a Rule 11 violation.

This Court found in its May 17, 1995, Order disposing of the Rule 11 issue that Rule 11 sanctions were appropriate. A copy of the Court's May 17, 1995, Order is appended which explains why Rule 11 was violated and concluded that in consideration of clearly controlling law, the conduct by Mr. Steagall was presented for the improper purpose to harass or to cause unnecessary delay or needless increase in the cost of litigation. In defense of his conduct, Mr. Steagall argued that he had to reallege the claim in his Second Amended Complaint so that it would not be waived on appeal. The Court found that this was a spurious argument and had no support in law. Indeed the Court pointed out that "it was clearly decided in *Bastian v. Petren Resources Corp.*, 892 F.2d 680, 682 (7th Cir.), *cert. denied*, 496 U.S. 906 (1990), that dismissed claims need not be included in an amended complaint because the final judgment brings up all previous rulings in the case. The Court went on to observe:

> [C]ounsel finds it difficult to accept adverse rulings. This is not the first time that counsel has been hostile to and openly disrespectful of opinions which go counter to his wishes. All too frequently during argument, he will bluntly warn the Court, presumably from a perception of superior knowledge, about federal constitutional issues, that decisions rendered are wrong and will be reversed on appeal. The Court does not appreciate such intimidating tactics and has cautioned counsel that it would not be moved by such threats of appeal. Counsel must realize that the Court – every court – does its best to make correct decisions and, once made, counsel is expected to respect (hopefully gracefully) the decision and act accordingly.

In imposing a sanction, the Court only censured Mr. Steagall speculating that Mr. Steagall perhaps did not realize what he was doing and how unseemly his conduct, and how it showed disrespect for the Court and the administration of justice. The Court, however, issued a warning that "future transgressions will not be treated with this degree of leniency." Now, Mr. Steagall is back before the Court under analogous circumstances. Essentially, he has again replead matters which have no bearing on the pretrial order and are not issues in the case for purposes of the pretrial order. Again Mr. Steagall attempts to justify his conduct by arguing that such repleading is necessary to preserve the record. Obviously, Mr. Steagall did not get the message clearly transmitted by this Court earlier. Having been put on notice as to the inappropriateness of unnecessarily repleading issues which are no longer issues in the case, it is apparent counsel failed or refused to make sure of the legal basis for his treatment of the pretrial order as the means of preserving evidentiary issues for purposes of appeal. Obviously, a censure is not enough to coerce Mr. Steagall to comply with the dictates and spirit of Rule 11. Therefore, the Court hereby imposes a monetary sanction of fifteen hundred dollars ($1,500.00).

IT IS THEREFORE ORDERED that plaintiff's counsel, Mr. Steagall, shall pay into Court a penalty in the amount of fifteen hundred dollars ($1,500.00) on or before July 10, 1996, as a sanction for this rule 11 violation.

ENTERED this 11th day of June, 1996.

/s/ Joe Billy McDade
JOE BILLY McDADE
United States
District Judge

7/8/96	118	NOTICE OF APPEAL by movant Richard L Steagall from Dist. Court decision [115-1] (sh) [Entry date 07/09/96]

* * *

7/29/96	124	ORDER by Judge Joe B. McDade denying motion to dismiss citation for criminal comtempt [sic] [116-1] (cc: all counsel) (sh) (Entry date 07/30/96]

* * *

8/2/96	–	MINUTE-ENTRY: by Judge Joe B. McDade granting motion for order to withdraw Plaintiff's Proposed Pre-Trial Order [113-1] (cc: all counsel) (sh)

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* * * DATE OF OCCURRENCE: 4/25/97 * * *

DOCKET ENTRY

MINUTE-ENTRY: By Judge Joe. B. McDade Upon further consideration of the matter, the Court, sua sponte, without regard to any motions filed by Attorney Steagall, now determines that the Rule 11 sanctions imposed by the Court are better suited for Mr. Steagall's refusal and failure to comply with the 2/27/96 Order of this Court than criminal contempt proceedings. Therefore the criminal contempt citation against Mr. Steagall is withdrawn and dismissed. (cc: all counsel)

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
AT PEORIA

TRAVIS HAMMOND Plaintiff	)	
vs.	)	Case No. 94-1331
RANDALL KUNARD, BRUCE HARMENING and LAWRENCE WAIT Defendants	)	

REPORT & RECOMMENDATION

(Filed Jan. 25, 1996)

This is an action for money damages filed directly under the U.S. Constitution and *Bivens v. Six Unknown Agents,* 403 U.S. 388 (1971). This court has jurisdiction pursuant to 28 U.S.C. §1331. Now before the court is the defendants' Motion to Dismiss (#40). The motion is fully briefed, and pursuant to Local Rule 1.4 the district judge has referred the matter to me for a report and recommendation. After carefully considering all of the submissions of the parties, and pursuant to 28 U.S.C. §636(b)(1)(B), I recommend that the motion be denied and the defendants be ordered to answer.

At the outset, I will reiterate and emphasize the procedural posture of this case. The original complaint was in two counts. Chief Judge Mihm dismissed the Clayton defendants from Count 2 in an order dated December 22, 1994. That order is now on appeal. It

appears that Count 2 remains pending as to the remaining defendants. Those defendants filed a motion to dismiss the entire suit (#40). In an order dated October 23, 1995, Chief Judge Mihm denied the plaintiff's motion to convert the motion into a summary judgment motion, and he denied the plaintiff's motion to take discovery. He

* * *

As a result of Mustread's information, Hammond was indicted by a federal grand jury and was brought to trial on charges of manufacture and distribution of marijuana and conspiracy. The government also brought a civil forfeiture action against the farm which was alleged to have been used in the marijuana scheme. After a jury trial, at which Mustread and others testified as to Hammond's involvement, the jury found Hammond not guilty of the manufacture and distribution charges and was unable to reach a verdict on the conspiracy charge. After the court declared a mistrial on the conspiracy charge, the government declined to re-prosecute and dismissed the conspiracy charge, and dismissed the forfeiture action.

Hammond now claims that the defendants knowingly and intentionally used false and perjured testimony before the grand jury and at trial, manufactured evidence and concealed exculpatory evidence in order to obtain a false conviction. Specifically, the plaintiff alleges that the agents encouraged Mustread to falsely implicate Hammond in the scheme and then knowingly obtained forfeiture warrants based on the false testimony.

The defendants move to dismiss, arguing both absolute and qualified immunity from the allegations contained in the complaint. The essence of their argument is

that, taking all of the allegations as true, these defendants have a legal defense to this suit and it should be dismissed as legally insufficient.

1. Absolute Immunity

The defendants argue, and the plaintiff appears to concede, that the defendants cannot be held liable for the consequences of testimony given to the grand jury or to the petit jury under *Briscoe v. LaHue*, 460 U.S. 325, 326 (1983); *Kincaid v. Eberle*, 712 F.2d 1023 (7th Cir. 1983), *cert. denied*, 464 U.S. 1018 (1983). There is no question that the defendants are absolutely immune from suit for such conduct.

However, the complaint alleges conduct beyond just testimony by the agents. It alleges that the agents solicited and encouraged by various methods, false testimony from others in the case, and that they falsified reports and manufactured evidence. These allegations go beyond testimony and do not fall within *Briscoe* immunity.

2. Qualified Immunity

The defendants next argue that they are entitled to qualified immunity for all of their alleged acts. A law enforcement officer has qualified immunity from suits for money damages unless the conduct violated clearly established constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818; *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Qualified immunity applies even if the officer was mistaken as to probable cause, if a reasonable officer would have concluded that probable cause existed,

Anderson v. Creighton, supra, 483 U.S. at 461; *Malley v. Briggs,* 475 U.S. 335 (1986).

At this stage, the court must consider whether the allegations of the complaint, *if true,* either did not violate clearly established rights or whether the alleged actions of the officers were reasonable under the circumstances. An affirmative answer to either question leads to a finding of qualified immunity and dismissal of this suit.

Taking the allegations as true, the complaint states that the defendants knowingly and intentionally solicited, encouraged and used Mustread's false testimony as to the plaintiff's involvement in the drug scheme. This is an allegation of bad faith, of actively concealing information and of suborning perjury. These allegations, if true, put this case outside of the shield of immunity offered by *Harlow* and *Malley. See, Jones v. City of Chicago,* 856 F.2d 985, 994 (7th Cir. 1988). While reasonable officers might disagree as to whether to believe Mustread's testimony, the complaint alleges that the defendants *knew* that the testimony was not true and encouraged Mustread to continue to implicate Hammond, knowing that his testimony was false.

The defendants cite to the transcript and the exhibits in support of their claim of reasonable belief. Hammond's testimony categorically disputes Mustread's testimony and that of other witnesses as well, and the jury must have found Mustread to be unreliable in view of the verdict. Under the *Conley* test for sufficiency of a complaint, that is taking all of the factual allegations as true and giving all inferences to the plaintiff, the complaint states a claim which is not defeated by the defendant's

immunity arguments. In addition, the Supreme Court has stated that a civil rights complaint need not contain allegations that overcome immunity defenses, *Leatherman v. Tarrant County,* 113 S.Ct. 1160 (1993).

The plaintiff may have a long and difficult road persuading the trier of fact in this case that the allegations of complicity in the drug transactions were not true and that the defendants "made up" the case against him. The defendants may certainly raise these issues again on a motion for summary judgment after the plaintiff has had an opportunity to conduct appropriate discovery.

Accordingly, I recommend that the Motion to Dismiss (#40) be DENIED and that the defendants be ordered to answer the complaint within 21 days of the date of final disposition of this motion by the court.

The parties are advised that any objection to this recommendation must be filed in writing with the clerk of this court within ten (10) working days after service of this recommendation. *See,* 28 U.S.C. §636(b)(1). Failure to object will constitute a waiver of objections on appeal. *Video Views, Inc. v. Studio 21, Ltd.,* 797 F.2d 538 (7th Cir. 1986); F.R.Civ.P. 72.

ENTER this 25th day of January, 1996.

/s/ Robert J. Kauffman
ROBERT J. KAUFFMAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

TRAVIS S. HAMMOND, Plaintiff, v. RANDALL KUNARD, BRUCE HARMENING and LAWRENCE WAIT, officers and agents of the United States Marshal Service, Internal Revenue Service and adjunct officers of the Drug Enforcement Administration in their official capacities, Defendants.	)	Case No. 94-1331

ORDER

(Filed March 7, 1996)

Before this court is the Motion to Dismiss [#40]. This matter was referred to the Magistrate Judge under Local Rule 1.4. On January 25, 1996, Magistrate Judge Robert J. Kauffman entered a Report & Recommendation denying the Motion. Pursuant to 28 U.S.C. § 636(b)(1) the parties had ten (10) working days after service of the Recommendation, until February 5, 1996, to file objections to the Magistrate Judge's decision. Defendants Randall Kunard, Bruce Harmening and Lawrence Wait timely filed their Objections to the Magistrate Judge's Report & Recommendation. On February 20, 1996, Plaintiff, Travis Hammond, filed his Response to the Defendants' Objections.

After reviewing all of the relevant pleadings, this Court DENIES the Defendants' Objections to the Magistrate Judge's Report & Recommendation and ADOPTS the Report & Recommendation in all respects. The Defendants are ORDERED to answer the Complaint within twenty-one (21) days of the date of this Order. This matter is referred to Magistrate Judge Robert J. Kauffman for further proceedings.

ENTERED this 7th day of March, 1996.

/s/ Michael M. Mihm
Michael M. Mihm
Chief United States
District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

TRAVIS S. HAMMOND, Plaintiff, v. RANDALL KUNARD, BRUCE HARMENING and LAWRENCE WAIT, officers and agents of the United States Marshal Service, Internal Revenue Service and adjunct officers of the Drug Enforcement Administration in their official capacities, Defendants.	)	Case No. 94-1331

MEMORANDUM OPINION

(Filed March 26, 1996)

Before this Court is Defendants' Motion to Reconsider. For the reasons set forth herein, this Court DENIES the Motion.

On April 17, 1995, Defendants Randall Kunard, Bruce Harmening, and Lawrence Wait (collectively referred to as "Defendants") field a Motion to Dismiss, asserting, among other things, the defense of qualified immunity. On January 25, 1996, Magistrate Judge Robert J. Kauffman entered a Report and Recommendation denying the Motion to Dismiss. Defendants filed timely Objections. On March 7, 1996, this Court entered an order adopting the Magistrate Judge's Report and Recommendation. Defendants filed this Motion to Reconsider on March 15, 1996.

A motion to reconsider is only available to " 'correct manifest errors of law or fact or to present newly discovered evidence.' " *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) (quoting *Keene Corp. v. International Fidelity Ins. Co.*, 561 F.Supp. 656, 665-66 (N.D.Ill. 1982)). Motions to reconsider are not to be used to "rehash" the arguments presented during the motion for summary judgment. *In re Oil Spill by "Amoco Cadiz"*, 794 F.Supp. 261, 267 (N.D. Ill. 1992).

Defendants have not presented this court with either a "manifest error of law" or any "newly discovered evidence." In adopting the magistrate Judge's Report and Recommendation, this Court found that Hammond had sufficiently alleged a claim that Defendants knowingly utilized false testimony, falsified reports, and manufactured evidence which led to his indictment.

The Seventh Circuit has held that a cognizable claim exists against a police officer if he knew or should have known that the information he presented to the grand jury did not provide probable cause for arrest. *Olson v. Tyler*, 771 F.2d 277, 281 (7th Cir. 1985). The *Olson* court recognized that a defense of immunity would not stand against such a claim because a reasonably-trained police officer would have known the arrest was illegal. *Id.* Hammond does not merely claim that Defendants committed perjury, for which they would be immune. *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108 (1983). He alleges that Defendants knowingly and intentionally solicited and utilized false testimony to obtain an indictment. The Court stands by its ruling.

As a final note, Defendants assert that this Court's denial of their Motion to Dismiss based on a qualified immunity defense is a final and appealable order, citing *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985), and *Behrens v. Pelletier*, 116 S.Ct. 834 (1996). Defendants are incorrect. Both *Behrens* and *Mitchell* stand for the proposition that an order denying summary judgment based on a qualified immunity defense is immediately appealable " 'to the extent that it turns on an issue of law.' " *Behrens*, 116 S.Ct. at 839 (quoting *Mitchell*, 472 U.S. at 528, 105 S.Ct. at 2816). In a recent Seventh Circuit case, *Clash v. Beatty*, Slip Op. 95-1917, at 7 (March 12, 1996), the court dismissed an appeal for lack of jurisdiction, holding that the district court's denial of summary judgment was based on the existence of genuine issues of fact and, therefore, the appeal was interlocutory in nature. In the case at bar, the Motion to Dismiss is not a final and appealable order because substantial facts remain contested, precluding this Court from determining whether Defendants' conduct violated a "clearly established" law.

Conclusion

For the reasons set forth herein, this court DENIES Defendants' Motion to Reconsider. This matter is referred to Magistrate Judge Robert J. Kauffman for further proceedings.

ENTERED this 26th day of March, 1996.

/s/ Michael M. Mihm
Michael M. Mihm
Chief United States
District Judge